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Supreme Court, U.S.
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In The

Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION,

Petitioner,

v.

KATHY KROSKE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding, contrary to the Sixth Circuit and the California Supreme Court, that the National Bank Act's grant to national banks of the power to dismiss their officers "at pleasure," 12 U.S.C. § 24 (Fifth), fails to preempt a state employment discrimination law because the applicability of a federal employment discrimination law enacted by Congress subsequent to the National Bank Act somehow makes state law applicable as well.

2. Whether the Ninth Circuit erred in holding, contrary to the Second and Sixth Circuits and this Court's precedents, that a presumption against preemption permits state laws to apply to national banks despite the longstanding preemptive force of the National Bank Act.

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Petitioner U.S. Bank National Association is a wholly owned subsidiary of USB Holdings, Inc., which in turn is a wholly owned subsidiary of U.S. Bancorp. U.S. Bancorp has no parent corporation and no publicly held corporation owns 10% or more of U.S. Bancorp's stock.

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PETITION FOR A WRIT OF CERTIORARI

U.S. Bank National Association (U.S. Bank) respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended opinion of the Ninth Circuit (App., *infra*, 1a-25a) is reported at 432 F.3d 976 (9th Cir. 2006), and the order amending the opinion on rehearing (App., *infra*, 2a) is reported at 432 F.3d 976. The opinion of the district court granting petitioner's motion for summary judgment (App., *infra*, 50a-61a) and its opinion on jurisdiction (App., *infra*, 62a-66a) are unreported.

JURISDICTION

The court of appeals entered its judgment on December 23, 2005. App., *infra*, 50a-61a. A petition for rehearing or rehearing *en banc* was denied and an amended opinion was filed on February 13, 2006. App., *infra*, 1a-25a. Justice Kennedy, on May 8, 2006, granted an extension of time within which to file a petition for a writ of *certiorari* to and including June 13, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution, U.S. Const. art. VI, provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * *, shall be the Supreme Law of the land."

Section 8 of the National Bank Act, 12 U.S.C. § 24 (Fifth), is reprinted in the appendix to this petition at App., *infra*, 68a.

Relevant provisions of the federal Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, are reprinted in the appendix to this petition at App., *infra*, 69a.

Relevant provisions of the Washington Law Against Discrimination, Wash. Rev. Code §§ 49.60.010-400, and Washington labor regulations, Wash. Rev. Code § 49.44.090, are reprinted in the appendix to this petition at App., *infra*, 71a-80a.

INTRODUCTION

From the earliest days of the Nation's founding, Congress and this Court have recognized the supremacy of federal law that governs federally chartered banks over all state law. Time and time again, this Court has ruled that the powers conferred to national banks by Congress through the National Bank Act are impervious to state interference, control, or regulation. Only the federal government, through Congress or the authority it has conferred on federal banking agencies, can limit the preemptive scope of federal banking law. States cannot, on their own accord, apply their state laws or otherwise subject national banks to state regulation.

The Ninth Circuit, however, has ignored this basic founding era tenet. The court of appeals ruled that state employment laws apply to the dismissal of national bank officers, based on its belief that the application of *federal* employment discrimination laws to national banks somehow opened the door for the imposition of *state* employment discrimination laws, notwithstanding a nearly 150-year-old statutory provision exempting the relevant employment decisions by national banks from state regulation. Indeed, Congress unequivocally provided that national banks can dismiss their officers – who hold positions requiring the highest levels of public trust – "at pleasure." 12 U.S.C. § 24 (Fifth). Congress granted similar authority to federal reserve banks and federal home loan banks to dismiss their employees. *See* 12 U.S.C. § 341 (Fifth); 12 U.S.C. § 1432(a).

Both the Sixth Circuit and the Supreme Court of California have recognized this clear congressional mandate and, in circumstances analogous to this case, have found state laws that place conditions on a bank's dismissal "at pleasure"

power to be preempted. Also, the Fourth Circuit has broadly recognized that the application of state employment laws to federally chartered financial institutions would conflict with their authority to dismiss officers "at pleasure." The Ninth Circuit's decision below – applying state age discrimination laws to national banks – plainly departs from these precedents and creates a clear split of authority with other federal court of appeals and highest state court decisions.

Immediate review by this Court is necessary in this case because the Ninth Circuit's decision will have a profound effect on national banks (as well as federal reserve banks and federal home loan banks) within the nine western States. The effect will be especially pervasive in California where state law employment claims will now be allowed in federal court even though California Supreme Court precedent prohibits them in state court as preempted by federal law.

The ruling below also will create confusion for federal district courts and state courts across the country. Age discrimination laws in the different States vary significantly from each other and from the federal employment discrimination laws. In many instances, States make conduct unlawful that is not unlawful under federal law, *e.g.*, some States prohibit conduct affecting employees younger than those covered by federal law, and different States require different procedures be followed and provide different remedies. The Ninth Circuit, however, adopted a standardless approach by holding that some but not all state employment laws are preempted, without providing an articulable standard for lower courts to discern which laws are preempted and which laws are not.

If left unreviewed by this Court, the Ninth Circuit's ruling will spawn significant, unnecessary, and costly litigation as to the effect of the ruling. Such litigation constitutes precisely the type of burden on national banks that Congress intended to preclude. *Certiorari* should be granted to resolve this important question of federal preemption involving national banks.

STATEMENT OF THE CASE

1. The Statutory And Regulatory Framework

a. Section 8 of the National Bank Act, 12 U.S.C. § 24, broadly delineates the powers of national banks. Among the authority conferred by Congress to a national bank is the power "[t]o elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, *dismiss such officers or any of them at pleasure*, and appoint others to fill their places." 12 U.S.C. § 24 (Fifth) (emphasis supplied). Similar language is employed in other federal banking statutes. *See, e.g.*, 12 U.S.C. § 341 (Fifth) (federal reserve banks may "dismiss at pleasure" officers and employees of the bank); 12 U.S.C. § 1432(a) (federal home loan banks may "dismiss at pleasure" officers, employees, attorneys, and agents of the bank).

Section 24 was enacted as part of the National Bank Act when, in 1863 and 1864, Congress created an exclusive and comprehensive federal regulatory regime to charter, supervise, and broadly govern the activities of national banks. *See* Act of Feb. 25, 1863, ch. 58, 12 Stat. 665; Act of June 3, 1864, ch. 106, 13 Stat. 99. The exclusivity of federal regulation under the Act established the supremacy of federal banking law and countered state hostility toward national financial institutions. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10 (2003). Indeed, through the National Bank Act, Congress intended that federal law alone would occupy the field of national banking. *See* Douglas H. Ginsburg, *Interstate Banking*, 9 Hofstra L. Rev. 1133, 1140 (1981).

This congressional enactment of strong federal control over national banking matters built on earlier congressional action that sought to create a national monetary policy, impervious from state interference, through the chartering of the Bank of North America (1781-1785) as well as the First (1791-1811) and Second (1816-1836) Banks of the United States. *Id.* at 1139; Act of Feb. 25, 1791, ch. 10, 1 Stat. 191; Act of April 10, 1816, ch. 44, 3 Stat. 266.

This Court has recognized that Congress thereby established the supremacy of federal authority in the field of national banks from the earliest days following the Nation's founding. The Court has noted that any state regulation of federal banks can undermine and frustrate that goal of Congress to create a stable national currency and monetary policy. *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. 316 (1819); *Beneficial Nat'l Bank*, 539 U.S. at 10-11; *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996); *First Nat'l Bank of San Jose v. California*, 262 U.S. 366, 368-369 (1923); *Easton v. Iowa*, 188 U.S. 220, 229-230 (1903).

b. Congress enacted the Age Discrimination in Employment Act of 1967 (ADEA) to make it unlawful for an employer to discriminate against individuals who are 40 years in age or older. 29 U.S.C. §§ 623(a), 631(a). Remedies under the ADEA include backpay, lost benefits, and reinstatement. 29 U.S.C. § 626(b).

This Court has assumed in prior decisions that *federal* employment discrimination laws such as the ADEA apply to banks that otherwise maintain their dismissal "at pleasure" authority under federal law over such employees. *Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984). The Court has never held or assumed, however, that *state* law overrides a bank's dismissal "at pleasure" power.

c. A Washington state statute makes it unlawful "[t]o refuse to hire any person because of age * * * ," Wash. Rev. Code § 49.60.180(1), "[t]o discharge or bar any person from employment because of age * * * ," *id.* § 49.60.180(2), or "[t]o discriminate against any person in compensation or in other terms or conditions of employment because of age * * * ." *Id.* § 49.60.180(3); *see also id.* § 49.44.090 (making it an unfair employment practice to discriminate against individuals age 40 and older). Individuals may sue employers for violations of these provisions for actual damages, including damages for emotional distress, as well as for attorney's fees. *Id.* § 49.60.030(2); *Bennett v.*

Hardy, 784 P.2d 1258 (Wash. 1990) (cause of action under Wash. Rev. Code § 49.44.090).

2. Factual And Procedural Background

a. Petitioner U.S. Bank National Association (U.S. Bank) is a federally chartered national bank that was formed in accordance with the National Bank Act, 12 U.S.C. § 21.

The board of directors of U.S. Bank elected respondent Kathy Kroske as a U.S. Bank Assistant Vice President in 1993, pursuant to their authority conferred by 12 U.S.C. § 24 (Fifth). App., *infra*, 3a. Respondent later assumed responsibility for U.S. Bank's Manito Branch Office in Spokane, Washington, and became the branch manager. *Ibid.* There, U.S. Bank eventually informed respondent that her branch was not performing adequately and warned her that if her branch continued to underperform she would be disciplined. *Ibid.* Because no improvement occurred, respondent was dismissed from her position in July 2002, in a decision ratified by U.S. Bank's board of directors. *Ibid.* At the time of her dismissal, respondent was fifty-one years old. *Id.* at 4a.

b. Following her dismissal, respondent sued U.S. Bank for age discrimination in Washington State Superior Court under Washington law. App., *infra*, 4a. She claimed that younger bank managers in their twenties and thirties had similar performance-related issues but were given more reasonable opportunities to turn around their branches' performance, and that she was replaced by a less-experienced manager in his mid-twenties. *Ibid.* Respondent alleged "economic and emotional injuries" and sought "[a]ctual damages as defined by Washington discrimination law," as well as attorney's fees. *See* Dist. Ct. Dkt. 1. Respondent did not bring any claim under the ADEA.

U.S. Bank removed the case to federal district court based on diversity of citizenship, 28 U.S.C. § 1332, and

moved for summary judgment on the ground that the state law claim is preempted by Section 8 of the National Bank Act, 12 U.S.C. § 24 (Fifth), which empowers a national bank to dismiss its officers "at pleasure." After U.S. Bank filed for summary judgment, respondent Kroske sought leave to amend her complaint to add claims for federal age discrimination. But, before the district court ruled on either Kroske's motion to amend or U.S. Bank's motion for summary judgment, Kroske abandoned that effort and never added a claim under the ADEA. *See* Dist. Ct. Dkt. 37.

The district court granted U.S. Bank summary judgment and ordered the case dismissed. App., *infra,* 60a. The court held that respondent was an officer of U.S. Bank under the various tests articulate and that, therefore, Section 24 (Fifth) applies to the terms of her employment. *Id.* at 52a-55a. Specifically, the court found that respondent's position "was created by the board of directors," that "she was directly appointed by the board of directors," and that "her termination was ratified in a timely manner by the Board of Directors." *Id.* at 55a. The court found that respondent "held a managerial position and was responsible for many bank operations" and, "as the head of a branch," "constituted a key part of [U.S. Bank's] public image." *Ibid.* The court noted that respondent "d[id] not dispute that she had the express legal authority to bind the bank, and as branch manager, she had decision making authority that related to fundamental banking operations." *Ibid.*

The district court ruled that respondent's state law claims are preempted by the National Bank Act under the reasoning of precedent of the Ninth Circuit and of this Court and under the plain text of the statute. The court explained that the Ninth Circuit, in *Mackey v. Pioneer National Bank*, 867 F.2d 520, [illegible] (1989), already had held that "tort and contract claims arising out of the employment relationship between a national banking association and its officers are completely preempted," and that the Supreme Court's holding that the National Bank Act is designed "to create a uniform and exclusive national law of regulation of national banking associations supports the

notion that the 'at pleasure' language was designed to subject national bank associations to a uniform scheme of federal law." App., *infra*, 56a-57a. The court also pointed to Ninth Circuit rulings that "at pleasure" language in the Federal Home Loan Bank Act and the Federal Reserve Act preempts wrongful discharge claims based on state law. *Id.* at 57a.

The district court rejected respondent's argument that the National Bank Act no longer preempts state law because Congress impliedly repealed the National Bank Act when it enacted the ADEA and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The court noted that U.S. Bank acknowledged that federal employment discrimination law may apply to national banks' dismissal of officers, but that U.S. Bank maintained that those federal statutes do not eliminate the preemptive force of the National Bank Act on state law. The court ruled that the ADEA and Title VII "cannot open the window to state legislation. To append consistent state regulation to Title VII and ADEA would upend the National Bank Act's uniform scheme of federal legislation and subject national banking associations to the vagaries of over 50 unique employment approaches." App., *infra*, 60a.

Finally, the district court dismissed an argument by Kroske that, under the California Supreme Court's ruling in *Peatros v. Bank of America*, 990 P.2d 539 (Cal. 2000), state employment discrimination claims are not preempted because claims under Title VII and the ADEA survive Section 24 (Fifth). App., *infra*, 59a-60a n.3. The district court explained that "[i]n *Peatros*, * * * the majority of justices (the main opinion and the concurring opinion) rejected the notion that the National Bank Act was impliedly amended by Title VII and ADEA, as to open the window for state antidiscrimination laws." *Ibid.*

c. The Ninth Circuit reversed on the preemption issue. App., *infra*, 26a-49a. As a threshold matter, the court affirmed that the amount in controversy meets the requirements for federal court diversity jurisdiction. *Id.* at 29a-31a. The court also noted that Kroske no longer claimed that she was not a bank officer. *Id.* at 31a.

Turning to the preemption issue, the court began from a starting point that presumed, in respondent's favor, that the National Bank Act does not preempt state employment discrimination law. App., *infra*, 33a-34a. Although the court purported to acknowledge that a presumption against preemption "does not apply * * * 'when the State regulates in an area where there has been a history of significant federal presence,'" and "that there is a significant federal presence in the regulation of national banks," the court of appeals nonetheless rejected that doctrine in this case. *Id.* at 33a. The only reason noted by the court for doing so was the fact that the state law here "was enacted pursuant to the State's historic police powers to prohibit discrimination on specified grounds." *Ibid.*

Under the court's misguided presumption against preemption, the court proceeded to hold that the National Bank Act does not preempt the field of state "law governing national banks' employment practices" because federal substantive authority over national banks is not exclusive. *Id.* at 35a. The court reasoned that state law is "modeled after and incorporated into the federal anti-discrimination laws" and the federal laws conflict with the National Bank Act's dismissal provision. *Id.* at 41a. Then, rather than merely giving effect to the ADEA by reconciling it to the extent possible with the National Bank Act, the court of appeals concluded that the National Bank Act had been repealed by implication to the extent necessary to give effect to the ADEA and, in a leap of reasoning, concluded that it must also be repealed to the extent necessary to give effect to the Washington state law which, in the court's view, "mirrors the substantive provisions of the ADEA and is interpreted consistently with the ADEA." *Id.* at 45a. The court went on to note that "parallel state antidiscrimination laws are explicitly made part of the enforcement scheme for the federal laws," App., *infra*, 46a, and to conclude that the state law employment discrimination provisions, "at least insofar as they are consistent with the prohibited grounds for termination under the ADEA" are not preempted. *Id.* at 49a.

In its initial opinion, the Ninth Circuit also indicated that the California Supreme Court had adopted a "similar

conclusion" in *Peatros v. Bank of America*, 990 P.2d 539 (Cal. 2000). App., *infra*, 45a-46a n.6. But that statement misconstrued *Peatros* because only three of the seven Justices on the California Supreme Court joined the opinion cited by the Ninth Circuit, and a majority of the *Peatros* court joined in the other opinions in that case which concluded that California's employment discrimination laws are preempted by the National Bank Act.

The Ninth Circuit denied panel rehearing, but excised the erroneous characterization of the *Peatros* case. The court issued an amended opinion that omits any reference to *Peatros* without any recognition that the Ninth Circuit's opinion here is contrary to that binding precedent of the California Supreme Court.[1] App., *infra*, 2a. The court of appeals denied rehearing *en banc*. *Ibid.*

REASONS FOR GRANTING THE PETITION

The decision below significantly undermines the effectiveness of the National Bank Act, which was designed to create a national banking system subject to uniform federal law and to maintain the stability and strength of that system by shielding it from state regulation. Review is necessary to avoid the application of a patchwork of state laws and to resolve the conflict between the Ninth Circuit ruling below and the decisions of the Sixth Circuit and the California Supreme Court.

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[1] A legal proposition supported by four or more Justices of the California Supreme Court is recognized as the holding of that court. *Del Mar Water, Light & Power Co. v. Eshleman*, 140 P. 948, 948 (Cal. 1914) (per curiam) ("[A]ny proposition or principle stated in an opinion is not to be taken as the opinion of the court, unless it is agreed to by at least four of the justices. The concurring opinion herein is the only one that is agreed to by the necessary number."). Accordingly, the Courts of Appeal in California recognize the opinions of Justices Kennard and Brown in *Peatros* as the holding of the California Supreme Court on this issue. *See Pereira v. Bank of America, N.T. & S.A.*, No. H021997, 2002 WL 221984, at *2-*3 (Cal. App. Feb. 13, 2002) (nonpublished opinion) (recognizing the opinions of Justices Kennard and Brown as the controlling holding of the court).

The Ninth Circuit's ruling subjects the dismissal of national bank officers to divergent state-by-state employment discrimination laws, contrary to the statutory purpose and to the express text of the National Bank Act, 12 U.S.C. § 24 (Fifth). Section 24 (Fifth) explicitly vests national banks with the "power" to dismiss "at pleasure" their bank "officers." The federal reserve banks and the federal home loan banks also are vested with dismissal "at pleasure" authority over their employees.

It is federal employment discrimination law, such as the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621, and not state law, that applies to dismissal of national bank officers. Respondent chose not to bring a claim under the ADEA, however, and that choice does not allow her to nonetheless pursue a state law suit on such a claim.

The Sixth Circuit and the Supreme Court of California have both correctly recognized that state employment discrimination laws are preempted by federal statutory authority of banking entities to dismiss employees "at pleasure." The court of appeals below parted ways with those courts because it misapplied well-settled principles of federal preemption and canons of statutory construction.

The Ninth Circuit erroneously applied an implied repeal analysis to find a purportedly irreconcilable conflict between the federal ADEA and the National Bank Act and then combined that with a presumption against preemption, despite the fact that such a presumption does not apply under the National Bank Act. The Ninth Circuit ignored this Court's holding in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), that the powers of national banks enumerated pursuant to Section 24 are "not normally limited by, but rather ordinarily pre-empting, contrary state law." *Id.* at 32.

The Ninth Circuit's decision swings the pendulum substantially away from this Court's rationale in *Barnett Bank*, which strongly favors preemption of state laws by federal national banking laws. The court of appeals' ruling, if allowed to stand, places a host of federally chartered

banks in jeopardy of being encumbered by widely varying state law, contrary to the national banking framework established by Congress, and undermines the fundamental federal character of national banks.

I. THE COURTS OF APPEALS AND STATE COURTS ARE IN CONFLICT AS TO WHETHER A CONGRESSIONAL GRANT OF POWER TO DISMISS "AT PLEASURE" CERTAIN EMPLOYEES OF FEDERALLY CHARTERED BANKS PREEMPTS STATE EMPLOYMENT LAW

The lower courts are divided on the question presented and this Court's review is warranted to ensure that national banks in different jurisdictions are not subject to divergent legal standards.

A. The Sixth Circuit And The California Supreme Court Have Squarely Held That Federal Statutory Authority To Dismiss Certain Banking Employees "At Pleasure" Preempts State Employment Discrimination Laws, In Direct Conflict With The Ruling Below

The Sixth Circuit and the California Supreme Court have unequivocally concluded that *all* state laws seeking to regulate the dismissal of certain bank employees are preempted where a bank exercises its federal statutory power to dismiss the particular employees "at pleasure." These courts correctly recognize that state laws which impose conditions on the dismissal of employees directly conflict with the plain language of federal statutes, such as Section 24 (Fifth), which grant the "at pleasure" dismissal authority. These holdings thereby protect the congressional purpose underlying the National Bank Act – the supremacy of federal banking powers – by ensuring that the dismissal of national bank officers – *i.e.*, those who hold positions requiring the highest levels of public trust, integrity, and confidence – remains free from state intrusion and

regulation, and that uniform federal banking laws, not the divergent laws of particular jurisdictions, apply to the dismissal of national bank officers.

1. The Sixth Circuit first addressed the issue presented by this case almost 20 years ago in *Ana Leon T. v. Federal Reserve Bank of Chicago*, 823 F.2d 928, 929-930 (6th Cir. 1987), *cert. denied*, 484 U.S. 945 (1987). The court there reviewed a claim by a federal reserve bank employee that she had been dismissed due to her race, national origin, and a job-related disability. The court noted that the allegations were plainly cognizable under federal law, *i.e.*, Title VII, but held that her claims raised pursuant to Michigan law were preempted by the dismissal "at pleasure" provision of the Federal Reserve Act. The court held that "Section 4, Fifth, of the Federal Reserve Act, 12 U.S.C. § 341, Fifth, specifically provides that employees of a federal reserve bank may be dismissed 'at pleasure.' This provision preempts any state-created employment right to the contrary." *Id.* at 931.

The Sixth Circuit recently reaffirmed that longstanding precedent in *Arrow v. Federal Reserve Bank of St. Louis*, 358 F.3d 392 (6th Cir. 2004), where a former federal reserve bank employee alleged "that the Bank had engaged in gender and disability discrimination * * * ." *Id.* at 393. The court again concluded that the language of the dismissal "at pleasure" provision of the Federal Reserve Act "applies to preempt state employment rights." *Ibid.* The Sixth Circuit found support in other appellate interpretations of the dismissal "at pleasure" language to establish that Congress intended to preempt state law. *Id.* at 394 (citing *Wiskotoni v. Michigan Nat'l Bank-West*, 716 F.2d 378, 387 (6th Cir. 1983) (construing 12 U.S.C. § 24 (Fifth)); *Andrews v. Federal Home Loan Bank of Atlanta*, 998 F.2d 214, 220 (4th Cir. 1993) (construing 12 U.S.C. § 1432(a)); and *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093, 1098 (9th Cir. 1981) (construing 12 U.S.C. § 341 (Fifth)).

2. The California Supreme Court reached the same conclusion in *Peatros v. Bank of America*, 990 P.2d 539 (Cal. 2000), where it addressed the claims of a former national bank vice president who alleged that she had

been terminated on the basis of her race and age in violation of California's employment discrimination laws. The court ultimately allowed the plaintiff's claims to proceed under fractured reasoning set forth in multiple opinions (on grounds not relevant here), but on the critical question of whether state law employment discrimination claims by national bank officers are preempted by Section 24 (Fifth), a majority of the court plainly held that they are preempted by the National Bank Act. *See id.* at 559 n.1 (Kennard, J., concurring and dissenting) (agreeing with Justice Brown); *id.* at 559-563 (Brown, J., dissenting for three Justices). The views reflected in the opinions of Justices Kennard and Brown constitute the holding of the California Supreme Court on this issue. *See* note 1, *supra*.

Neither the rulings of the Sixth Circuit nor of the California Supreme Court can be reconciled with that of the Ninth Circuit below.

B. The Ninth Circuit Ruling Below Finds No Support In Other Appellate Case Law

1. The Fourth Circuit has issued an opinion involving a state wrongful termination law that is in significant tension with the Ninth Circuit's ruling in this case, although that court has not addressed the precise question of the preemptive effect of the federal dismissal "at pleasure" provision on state employment discrimination law.

In *Andrews v. Federal Home Loan Bank of Atlanta*, 998 F.2d 214 (4th Cir. 1993), the Fourth Circuit cited with approval the Sixth Circuit's decision in *Leon* discussed above. The court held that all state law wrongful termination actions are preempted under the dismissal "at pleasure" provision of the Federal Home Loan Bank Act, 12 U.S.C. § 1432(a). The court emphasized that "Congress intended for *federal* law to define the discretion which the Bank may exercise in the discharge of employees." *Id.* at 220 (emphasis supplied). The Fourth Circuit broadly recognized that only a federal law can apply to the dismissal "at pleasure" language, and that that provision cannot be limited by state law.

2. Only one other appellate decision has held that a state employment discrimination law is not preempted when examining a federal dismissal "at pleasure" provision, but that ruling – from an intermediate state appellate court from Ohio – does not apply the rationale of the Ninth Circuit. Instead, the Ohio intermediate court extends its non-preemption ruling far beyond what the Ninth Circuit apparently would support and declined to find *any* preemption. In *White v. Federal Reserve Bank*, 660 N.E.2d 493 (Ohio Ct. App. 1995), the Ohio court of appeals resolved a case brought by a federal reserve bank employee who alleged that he was discriminated on the basis of his disability in violation of Ohio state law. Like the Ninth Circuit, the Ohio court applied a presumption against preemption, and concluded that nothing in the language of the dismissal "at pleasure" provision or legislative history of the Federal Reserve Act evinced an intent of Congress to preempt state law. *Id.* at 494-496. According to the Ohio court, the dismissal "at pleasure" language was aimed only at imposing at-will employment, which could be modified by subsequent law. *Id.* at 496.

This Ohio decision ignores two centuries of judicial rulings concerning the purpose and intent behind the Nation's federal banking system, and leaves open the possibility that *any* state employment law can apply to national banks, federal reserve banks, and federal home loan banks. *Ibid.*

C. The Disagreement In The Lower Courts Undermines Congress's Longstanding Framework Of Uniform Regulation Of National Banks And Will Lead To Anomalous Results

1. The Ninth Circuit's ruling frustrates the purpose of the National Bank Act

The ruling below undermines the purpose of the National Bank Act to create a uniform national banking system, free from state interference, so that any attempt to impose state law requirements upon a national bank's most vital positions of trust, its officers, is void. *See Peatros*, 990

P.2d at 561 (Brown, J., dissenting) ("'National banks are instrumentalities of the Federal government, created for a public purpose[.] * * * [A]n attempt by a State to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and * * * frustrates the purpose of the national legislation * * * .'") (quoting *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896)). "'These principles are axiomatic' to the nature of a national banking system." *Ibid.*; *see also id.* at 559 n.1 (Kennard, J., concurring and dissenting) ("[T]he act fully preempts a state law * * * action. For in that situation the state law claim conflicts with the objectives of the National Bank Act."); *see also Beneficial Nat'l Bank*, 539 U.S. at 10-11; *Barnett Bank of Marion County*, 517 U.S. at 32.

The Ninth Circuit ruling also undermines the preemptive strength of the National Bank Act because it applies a misguided implied repeal analysis that expands the impact that later enacted federal statutes may have on the National Bank Act. Under the Ninth Circuit reasoning, later enacted federal statutes such as the ADEA are not merely reconciled with the National Bank Act by being interpreted to override prior inconsistent provisions of the Act (such as the ADEA applying to dismissal of national bank officers notwithstanding the "at pleasure" provision of the Act). According to the Ninth Circuit, Congress's later enactment of such a federal statute will now also give *state* statutes the same force to override the National Bank Act.

The California Supreme Court correctly and directly rejected this type of reverse preemption analysis in the guise of an implied repeal analysis. Then-Justice Brown on the California Supreme Court explained that, "[a]bsent a clear expression" of congressional intent, "amendment or repeal of one federal statute by another should not be read as an invitation to append analogous *state* laws to the national scheme," *Peatros*, 990 P.2d at 562 (Brown, J., dissenting) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984) (emphasis added)).

And there is an obvious difference in the consequences that flow from a federal employment discrimination statute being reconciled with the National Bank Act, as opposed to a state law trumping a federal banking statute. The supremacy of federal law established by the National Bank Act is not disturbed by the uniform application of *federal* employment discrimination laws throughout the country, but is significantly disturbed by the application of *state* laws, *ibid*, especially divergent state laws which exacerbate this problem.

The Ninth Circuit's reliance on *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 101 (1983), is misplaced. *Shaw* does not provide support for the court of appeals' implied repeal analysis. *Shaw* resolved the issue of the correct interpretation of the *savings clause* in the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq. Peatros*, 990 P.2d at 559 (Kennard, J., concurring and dissenting). ERISA's savings clause, unlike the National Bank Act, broadly preserves all other potentially conflicting federal law in its entirety, so that ERISA "shall not 'be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States.'" *Shaw*, 463 U.S. at 101. Thus, in *Shaw* the question was whether Title VII might be at all "impair[ed]" if ERISA were interpreted to preempt state employment discrimination laws. This Court concluded that, because Title VII can rely upon state agencies for screening and investigative purposes, the preemption of all state laws would "modify" and "impair" the operation of Title VII in violation of ERISA's savings clause which limits ERISA's preemptive force. Here, however, "the National Bank Act * * * contains no similar self-imposed limitation on its preemptive force, a crucial distinction * * *. Because the National Bank Act does not limit its preemptive effect, there is no basis for adopting a partial preemption analysis * * *." *Peatros*, 990 P.2d at 559 (Kennard, J., concurring and dissenting).[2]

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[2] It is no answer for Kroske to rely upon the state law deferral provisions of the ADEA (cited by the Ninth Circuit) as a justification

(Continued on following page)

2. The Ninth Circuit's ruling means that national bank officers in California can bring employment discrimination claims under state law in federal court, but not in state court

The Ninth Circuit's decision will have particularly anomalous results within California. Under the California Supreme Court's decision in *Peatros*, a state court must dismiss as preempted any employment discrimination claim brought by a national bank officer under state law alleging an unlawful dismissal. But under the Ninth Circuit's holding in the instant case, that bank officer can bring that very same preempted state law claim in federal court.

The Ninth Circuit is directly at odds with the California Supreme Court over whether a state cause of action exists for officers of national banks to challenge their dismissal. The highest state court forbids such claims to be adjudicated in state trial courts, but the Ninth Circuit now allows them to be decided in federal district court. No good can come of this conflict. This federal-state intrastate split will unquestionably lead to substantial forum shopping, as plaintiffs are in the odd circumstance of needing to manufacture federal jurisdiction to preserve their state law claims.

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against preemption. Employees are required to exhaust administrative remedies with the Equal Employment Opportunity Commission (EEOC) or equivalent state agency before filing a suit for violation of the ADEA. 29 U.S.C. §§ 626(d), 633(b). Notwithstanding the ADEA's use of state administrative agencies for exhaustion purposes, however, the ADEA explicitly left state law where it stood prior to the enactment of the ADEA. The ADEA does not confer jurisdiction under state employment discrimination laws or on state agencies that enforce them. The ADEA specifies that "[n]othing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age." 29 U.S.C. § 633(a). Accordingly, if a State provides a remedy, a plaintiff first seeks recourse under state law, 29 U.S.C. § 633(b), but otherwise seeks immediate relief by filing a charge with a federal agency. 29 U.S.C. § 626.

3. The Ninth Circuit's ruling will create confusion for national banks and spawn litigation regarding the scope of the Ninth Circuit's standardless preemption test

The Ninth Circuit's decision creates substantial uncertainty, especially for national banks within the nine States of the Ninth Circuit. Further percolation in the lower courts will not resolve or clarify the issues.

The question of whether state law is preempted by the dismissal "at pleasure" authority of a federal bank has been thoroughly examined by the Sixth Circuit, the Ninth Circuit, and the California Supreme Court. The preemption question presented in the instant dispute will require the inevitable resolution by this Court, and delay now will only subject national banks to the substantial costs associated with uncertain state-by-state regulation in the interim, in direct contravention of Congress's intent.

The Ninth Circuit erroneously appears to view its ruling to be one that would have limited effect because the court indicated that the Washington state age discrimination law under which respondent brought her state law claim "mirrors the substantive provisions of the ADEA and is interpreted consistently with the ADEA." App., *infra*, 21a. But the Ninth Circuit provided no guidance to lower courts as to what it meant by that overbroad declaration.

For example, in an earlier section of its opinion where it upheld the finding of the required amount-in-controversy for federal diversity jurisdiction, the Ninth Circuit relied in part on the amount of emotional distress damages that respondent might be able to recover if she were to prevail on the merits of her state law claim. App., *infra*, 6a (emotional distress damages available pursuant to Washington law). But emotional distress damages are not available under the ADEA. *Commissioner v. Schleier*, 515 U.S. 323, 326 (1995) ("[T]he Courts of Appeals have unanimously held * * * that the ADEA does not permit * * * compensatory damages for pain and suffering or emotional distress."). Although federal jurisdiction exists in this case based on the amount-in-controversy being met

by the attorney's fees sought by respondent (which are available under both state and federal law), the Ninth Circuit chose to rely for its amount-in-controversy ruling on the exclusive state law remedy of emotional distress damages rather than attorney's fees. App., *infra*, 6a. But the court of appeals did not make clear how its view of the Washington state law as mirroring the "substantive provisions" of and being interpreted consistently with the ADEA affects such inconsistent state law remedies. Respondent also failed to exhaust administrative remedies, which would be required under the ADEA, because Washington law requires no exhaustion. Wash. Rev. Code § 49.60.030(2).

Thus, in this very case, continued litigation will be required over the scope of the preemption rule created by the Ninth Circuit. Should Kroske's state law claims go forward on remand, the district court will be required to determine whether the ADEA's limitations on recoverable damages and its administrative exhaustion requirements are "substantive provisions" of the ADEA that are somehow mirrored by state law (so that they are not preempted) or, if they are not, whether they are then preempted by the National Bank Act.

Moreover, all States within the territorial jurisdiction of the Ninth Circuit have laws that could be said to mirror, to some degree, substantive provisions of the ADEA because they preclude discrimination against individuals on the basis of age. But, on another level, the state laws diverge radically from each other and from the ADEA on a number of provisions which may or may not be "substantive" under the Ninth Circuit's holding. Accordingly, the Ninth Circuit ruling will also cause significant litigation in future cases in other States within the jurisdiction over the collateral issue of what aspects of state law can apply to national banks under the Ninth Circuit's flawed analysis.

For example, whereas the federal ADEA makes discrimination on the basis of age unlawful only against employees age 40 and older, Oregon makes such conduct unlawful against employees as young as age 18, Or. Rev.

Stat. § 659A.030, and Alaska, Hawaii and Montana have no apparent age-minimum for employees to bring age discrimination claims. *See* Alaska Stat. § 18.80.200(b); Haw. Rev. Stat. § 378; Mont. Code Ann. § 49-2-101. Also, the ADEA makes it unlawful only for employers who have 20 or more employees to engage in such conduct. By contrast, every State within the Ninth Circuit makes it unlawful for employers with *less* than 20 employees to violate the state's statutory prohibition. *See* Alaska Stat. § 18.80.300(4); Ariz. Stat. § 41-1461(4); Cal. Gov. Code § 12926(d); Haw. Rev. Stat. § 378-1; Idaho Code § 67-5902; Mont. Code Ann. § 49-2-101(11); Nev. Rev. Stat. § 613.310(2); Or. Rev. Stat. § 659A.001; Wash. Rev. Code § 49.60.040(3).

The Ninth Circuit's decision thus creates confusion as to what to do about state law procedures and remedies that are different from those under the ADEA. Unlike the ADEA, Alaska, Oregon and Washington require no exhaustion of administrative remedies prior to the filing of a complaint. *See* Alaska Stat. § 18.80.145(a); Or. Rev. Stat. § 659A.870(2); Wash. Rev. Code § 49.60.030(2). And a number of jurisdictions provide for more expansive remedies for violations of state law (in some circumstances including punitive damages) that are not allowed under the ADEA. *See* Haw. Rev. Stat. § 368-17(a); Idaho Code § 67-5908; *A.L.P. Inc. v. Bureau of Labor & Indus.*, 984 P.2d 883 (Or. App. 1999); *Blaney v. International Ass'n of Machinists & Aerospace Workers*, 87 P.3d 757 (Wash. 2004).

These concerns about extended litigation over the scope of the Ninth Circuit's ruling are by no means inchoate. Indeed, significant confusion already exists amongst the district courts as to the preemptive scope of Section 24 (Fifth) and the other dismissal "at pleasure" provisions. The court of appeals' decision in this case will only further that legal turmoil, because it will require extended litigation to determine not only whether state law is preempted but also as to what extent. Already a number of courts have declined to find preemption of state

employment laws by the statutes that authorize a federally chartered bank to dismiss certain employees "at pleasure." *See Moodie v. Federal Reserve Bank of N.Y.*, 835 F. Supp. 751, 753 (S.D.N.Y. 1993); *Moodie v. Federal Reserve Bank of N.Y.*, 831 F. Supp. 333 (S.D.N.Y. 1993); *Mueller v. First Nat'l Bank of the Quad Cities*, 797 F. Supp. 656 (C.D. Ill. 1992); *Booth v. Old Nat'l Bank*, 900 F. Supp. 836, 843 (N.D. W. Va. 1995). But other district courts have reached the opposite conclusion. *See Evans v. Federal Reserve Bank of Phila.*, No. Civ.A. 03-4975, 2004 WL 1535772, at *5 (E.D. Pa. July 8, 2004); *Sheehan v. Anderson*, No. 98-5516, 2000 WL 288116 (E.D. Pa. Mar. 17, 2000), *aff'd*, 263 F.3d 159 (3d Cir. 2001); *Kispert v. Federal Home Loan Bank of Cincinnati*, 778 F. Supp. 950, 952-953 (S.D. Ohio 1991); *Osei-Bonsu v. Federal Home Loan Bank of New York*, 726 F. Supp. 95, 97 (S.D.N.Y. 1989).

Absent review by this Court, these inconsistent decisions will continue to arise in district courts at great costs to national banks and other federally chartered banks, and cause further confusion as to which aspects of state law apply. Courts will expend unnecessarily their limited resources parsing various state employment discrimination law provisions to discern the minutia of their substantive nature (or not) and their consistency (or not) with the ADEA to decide whether, and to what extent, those state laws apply to national banks under the Ninth Circuit's ruling here. These lower courts will not be analyzing the question presented here and thus will be providing no new analysis to the already extensively vetted and much broader threshold preemption question. Of course, the burden and costs of litigation as these collateral issues are addressed will be imposed on national banks (and their customers) in suits that should not be allowed to proceed in the first place because, in fact, all application of state employment law to the dismissal of national bank officers is preempted by the dismissal "at pleasure" power conferred on national banks by Congress.

D. The Court Should Grant Review To Bring The Ninth Circuit In Line With The Plain Language Of The National Bank Act

1. The Constitution designates the "Laws of the United States" as the "Supreme Law of the Land." U.S. Const. art. VI. Whether a federal statute or regulation preempts state law pursuant to the Supremacy Clause "fundamentally is a question of congressional intent." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990). Congress can demonstrate its intent to preempt state law through explicit statutory language, by occupying a given field to leave no room for the States to supplement it, or by a federal statute that conflicts with a state statute or regulation. *Barnett Bank of Marion County*, 517 U.S. at 31; *English*, 496 U.S. at 79. Specifically, the latter preemption rationale applies "where it is impossible for a private party to comply with both state and federal requirements, or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *English*, 496 U.S. at 79 (internal citation omitted, citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), and quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see also Barnett Bank of Marion County*, 517 U.S. at 31 (same).[3]

Section 24 (Fifth) empowers a national bank to dismiss its officers at pleasure, *e.g.*, without constraint of state law, and thus that imposition of state employment discrimination law conflicts with that federal statutory authority. In addition, state employment discrimination law "stands as an obstacle" to the accomplishment of the purposes of the National Bank Act to preserve the uniformity of the national banking system, to protect the financial security and integrity of national banks from unscrupulous or incompetent officers holding positions of

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[3] This Court has held that field and conflict preemption are not "rigidly distinct." *English*, 496 U.S. at 79 n.5. "[F]ield pre-emption may be understood as a species of conflict pre-emption * * * ." *Id.* at 79-80 n.5.

public trust, *see Westervelt v. Mohrenstecher*, 76 F. 118, 122 (8th Cir. 1896), and, more generally, to insulate national banks from state interference and regulation. *Cf. Beneficial Nat'l Bank*, 539 U.S. at 10-11; *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896); *Talbott v. Board of County Comm'rs of Silver Bow County*, 139 U.S. 438, 443 (1891).

The Ninth Circuit ignored these well-settled preemption principles. Rather than rely upon the obvious conflict between state and federal law, as well as the attendant frustration of the very purpose behind the nearly 150 year-old National Bank Act, the Ninth Circuit, instead, characterized the ADEA as impliedly repealing the National Bank Act and then leapt to the conclusion that that meant that *state* employment discrimination law also trumps the National Bank Act, and thus does not conflict.

But this *ipse dixit* analysis – that because a later enacted *federal* employment discrimination law overrides Section 24 (Fifth), then corresponding *state* law also does – overlooks the fact that congressional purpose is paramount to any implied repeal analysis. *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The ADEA was plainly designed to give a federal remedy for age discrimination because States had failed to rectify such discrimination. The National Bank Act, as noted above, was enacted, for among other reasons, to create a uniform system of national banking and to shield national banks from state laws that could be applied in a hostile manner. There is no conflict between these statutory goals because the application of a uniform federal employment discrimination law to national banks is consistent with the National Bank Act's purpose. Application of state employment discrimination laws, however, particularly where they are divergent, frustrates that purpose.

2. In any event, even were an implied repeal analysis called for, the Ninth Circuit got that analysis wrong on its own terms. As this Court has admonished, implicit repeals of conflicting federal statutes occur "only if

necessary" to make the later-enacted statute "work, and even then only to the minimum extent necessary." *Silver v. New York Stock Exchange*, 373 U.S. 342, 357 (1963). As noted above, the ADEA plainly contemplates its effective operation in the *absence* of State law. *See* 29 U.S.C. § 633(a) (creating no jurisdiction for state law); 29 U.S.C. § 626 (authorizing employees to file claims with the EEOC); 29 U.S.C. § 633(b) (requiring deferral only where State law exists). Accordingly, application of *only* federal employment discrimination law to national banks would enable the ADEA to "work" without "[un]necessar[ily]" undermining the National Bank Act and its goals of uniformity and the prevention of state regulation. *Silver*, 373 U.S. at 357.

Thus, the ruling below strikes at the very heart and purpose underlying the National Bank Act. Left unreviewed, national banks within the Ninth Circuit will now be required to comply with divergent standards of state employment discrimination laws and procedures, will see an attendant increase in the costs of complying with the peculiarities of multiple jurisdictions rather than a single national standard, and may be compelled to pay administrative penalties, fines, and money damages not contemplated by federal law, all of which will undermine the safety and soundness of national banks.

II. THE NINTH CIRCUIT'S APPLICATION OF A PRESUMPTION AGAINST PREEMPTION IGNORED THE CONGRESSIONAL INTENT TO PREEMPT STATE REGULATION OF NATIONAL BANKS DATING BACK TO THE FOUNDING, IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS AND THIS COURT

A. Even though the Ninth Circuit acknowledged the long history behind the uniform, national banking system, it still applied a presumption against the preemption of state law. The court did so based on its observation that the state employment discrimination law was enacted pursuant to Washington's police powers. App., *infra*, 9a.

But the court of appeals ignored the fact that a presumption against preemption does *not* apply, even to historic police powers, "when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000). The issue thus turns on whether "Congress has legislated in the field from the earliest days of the Republic, creating an extensive federal statutory and regulatory scheme." *Ibid.*

This Court has answered that question in the affirmative for the National Bank Act. In *Barnett Bank of Marion County, N.A. v. Nelson*, this Court addressed the issue of whether an enumerated power granting national banks in small towns the authority to sell insurance preempted a Florida state law prohibiting the very same conduct. 517 U.S. 25 (1996). In deciding this issue, the Court recognized, from a historical standpoint, that powers conferred pursuant to Section 24 are "not normally limited by, but rather ordinarily pre-empting, contrary state law." *Barnett Bank of Marion County*, 517 U.S. at 32. Rather than assume that state law survives preemption, as a presumption against preemption does, this Court requires, in essence, a contrary presumption in the context of the National Bank Act: "In defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Id.* at 33.

B. Both the Second and Sixth Circuits have held correctly that a presumption against preemption does not apply in cases involving the regulation of federally chartered banks.

The Second Circuit in *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305 (2d Cir. 2005), *pet. for cert. pending*, No. 05-431 (Oct. 4, 2005), noted that "[t]here is typically a presumption against preemption in areas of regulation that are traditionally allocated to states and are of particular local concern." *Id.* at 314. "'The presumption against federal preemption disappears, however, in fields

of regulation that have been substantially occupied by federal authority for an extended period of time. Regulation of federally chartered banks is one such area.'" *Ibid.* (quoting *Flagg v. Yonkers Sav. & Loan Ass'n*, 396 F.3d 178, 183 (2d Cir. 2005)).

In *Wachovia Bank, N.A. v. Watters*, 431 F.3d 556 (6th Cir. 2005), the Sixth Circuit reached the same conclusion. It held that the field of banking is so occupied by federal law that a presumption against preemption cannot apply. *Id.* at 560 n.3.

C. Significantly, because a presumption against preemption unquestionably places a greater burden upon the party seeking to invalidate state law, it often is outcome determinative. The Ninth Circuit's decision, by applying a presumption in a field with a substantial federal presence since the founding of the nation, thus threatens numerous other banking laws and regulations with interference from state law, by now requiring a finding of greater congressional intent to preempt state law.

This Court should resolve this conflict of authorities between the Ninth Circuit and the Second and Sixth Circuits, and rectify the Ninth Circuit's divergence from this Court's precedent.

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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JUNE 13, 2006

432 F.3d 976

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Kathy Kroske, an individual, *Plaintiff-Appellant,* *v.* US Bank Corp., a foreign corporation; dba US Bank *Defendants-Appellees.*	No. 04-35187 D.C. No. CV-02-00439-RHW ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Robert H. Whaley, District Judge, Presiding

Argued and Submitted
July 15, 2005 – Seattle, Washington

Filed December 23, 2005
Amended February 13, 2006

Before: A. Wallace Tashima, Richard A. Paez, and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Paez

COUNSEL

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Thomas Bassett & Angel Rains, Lukins & Annis P.S., Spokane, Washington, for the defendant-appellant.

ORDER

The opinion filed December 23, 2005 is amended as follows:

1. Footnote six is deleted in its entirety.

2. The first sentence of Part I ("Background") is deleted in its entirety and replaced with the following sentence: "U.S. Bank Corp., a Delaware corporation, owns U.S. Bank National Association, which is a federally chartered National Banking Association that was formed in accordance with the National Bank Act, 12 U.S.C. § 21."

With these amendments, Appellees' petition for panel rehearing is DENIED.

The full court has been advised of Appellees' petition for rehearing en banc, and no active judge of the court has requested a vote on whether to rehear the case en banc. Fed. R. App. P. 35(b). Therefore the petition for rehearing en banc is DENIED.

No further petitions for panel rehearing or rehearing en banc shall be filed.

OPINION

PAEZ, Circuit Judge.

Kathy Kroske appeals the district court's order granting Defendant U.S. Bank Corp.'s motion for summary judgment, dismissing Kroske's age discrimination claim under the Washington Law Against Discrimination ("WLAD"), Wash. Rev. Code §§ 49.60.010-.400. Kroske first contends that the district court erroneously concluded that

the amount in controversy exceeded $75,000 and therefore improperly determined that it had diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1). Kroske further argues that the district court erroneously concluded that the National Bank Act, 12 U.S.C. §§ 21-216d, preempts her age discrimination claim under the WLAD. We have jurisdiction under 28 U.S.C. § 1291. We conclude that diversity jurisdiction is proper and that Kroske's age discrimination claim under the WLAD was not preempted. Accordingly, we reverse and remand.

I. Background

U.S. Bank Corp., a Delaware corporation, owns U.S. Bank National Association, which is a federally chartered National Banking Association that was formed in accordance with the National Bank Act, 12 U.S.C. § 21. The Bank is governed by a board of directors, which is empowered by the Bank's bylaws to elect and discharge officers.

Kathy Kroske began working for the Bank in 1977 as a teller. On April 20, 1993, the Bank's board of directors elected Kroske as an officer in the role of Assistant Vice President. During restructuring due to a merger, the Bank changed Kroske's position from retail market manager to manager of the Manito bank branch in Spokane, Washington. As manager, Kroske was notified that her branch was not meeting the Bank's goals and quotas for business activity. Although Kroske contends that her branch was the smallest in the area with the fewest employees, and that she was short-staffed, the Bank continued to insist that her branch meet fixed business activity levels and warned that she would be disciplined if it did not. Ultimately, in July 2002, the Bank terminated Kroske for

allegedly failing to meet the daily performance goals. The board of directors subsequently ratified Kroske's termination in a meeting convened in Minneapolis, Minnesota.

Kroske filed suit in Washington State Superior Court against the Bank. She alleged that at the time of her termination, the other branch managers in the region were in their twenties and thirties, while Kroske was fifty-one years old. Further, the Bank allegedly gave these younger managers a reasonable opportunity to meet the business activity goals and denied Kroske such an opportunity. In addition, Kroske contended that she was replaced by an employee who was in his mid-twenties and possessed less experience than Kroske. Kroske therefore alleged that the Bank had terminated her on the basis of her age in violation of the WLAD, and sought damages, as well as attorney's fees and costs. In her complaint, Kroske did not allege any federal causes of action.

The Bank removed the case to federal court and, once in federal court, filed a motion for summary judgment arguing that Kroske's state discrimination claim was preempted by the National Bank Act, specifically 12 U.S.C. § 24(Fifth), which grants national banks the power to dismiss officers "at pleasure." Kroske opposed the motion, contending that she was not an officer under § 24(Fifth) and, in the alternative, that the National Bank Act did not preempt her age discrimination claim under the WLAD.

The district court granted the Bank's motion for summary judgment. The court held that Kroske qualified as an "officer" under the National Bank Act. Further, the district court concluded that § 24(Fifth) preempts the field of law regulating the Bank's employment practices and

therefore preempted Kroske's age discrimination claim under the WLAD. Kroske timely appealed, challenging the district court's jurisdiction and the grant of summary judgment.

II. Amount In Controversy

Kroske first contends that removal of her case to federal court was improper because the district court lacked diversity jurisdiction under 28 U.S.C. § 1332.[1] She argues that the Bank did not meet its burden of establishing that the amount in controversy exceeded $75,000. "We review de novo a district court's determination that diversity jurisdiction exists." *Breitman v. May Co. Cal.*, 37 F.3d 562, 563 (9th Cir. 1994). The factual determinations necessary to establish diversity jurisdiction are reviewed for clear error. *Co-Efficient Energy Sys. v. CSL Indus., Inc.*, 812 F.2d 556, 557 (9th Cir. 1987).

Where, as here, "the complaint does not demand a dollar amount, the removing defendant bears the burden of proving by a preponderance of evidence that the amount in controversy exceeds $[75],000." *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 376 (9th Cir. 1997); *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 839 (9th Cir. 2002). The amount in controversy includes the amount of damages in dispute, as well as attorney's fees, if authorized by statute or contract. *See Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1155-56 (9th Cir. 1998). When the amount is not

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[1] 28 U.S.C. § 1332(a)(1) provides, in relevant part, "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States."

"facially apparent" from the complaint, "the court may consider facts in the removal petition, and may 'require parties to submit summary-judgment-type evidence relevant to the amount in controversy at the time of removal.'" *Singer*, 116 F.3d at 377 (quoting *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335-36 (5th Cir. 1995)).

Here, Kroske's complaint alleged that "she suffered and continues to suffer economic and emotion [sic] injuries and other damages, with specific amounts to be proven at the time of trial." In response to the Bank's interrogatories, Kroske further identified the following categories of damages: lost wages, benefits including but not limited to health and mental insurance, 401(k) contributions, value of life insurance policies, stock options, and emotional distress damages, as well as attorney's fees and costs. Kroske did not, however, allege the amount of damages or fees she sought.

In determining the amount in controversy, the district court properly considered Kroske's interrogatory answers and emotional distress damage awards in similar age discrimination cases in Washington. *See De Aguilar v. Boeing Co.*, 11 F.3d 55, 58 (5th Cir. 1993). Based upon a preponderance of the evidence, the court concluded that Kroske's lost wages amounted to at least $55,000, that her 401(k) contribution amounted to at least $1000, and that her emotional distress damages would add at least an additional $25,000 to her claim. Therefore, even without including a potential award of attorney's fees, the district court found that the amount in controversy exceeded $75,000. This finding was not clearly erroneous; diversity jurisdiction properly exists in this case.

III. Preemption

Kroske contends that the district court erred in concluding that her age discrimination claim under the WLAD, Wash. Rev. Code § 49.60.180, was preempted by the National Bank Act. The National Bank Act provides that a national bank shall have the power "[t]o elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, *dismiss such officers or any of them at pleasure*, and appoint others to fill their places." 12 U.S.C. § 24(Fifth) (emphasis added). Kroske concedes that she was appointed and terminated by the board of directors and does not challenge the district court's determination that she was an "officer" under 12 U.S.C. § 24(Fifth). Kroske contends, however, that the district court erred in determining that her state law age discrimination claim is preempted by the dismiss-at-pleasure provision of § 24(Fifth). We agree.

"We review a district court's grant of summary judgment de novo." *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 321 F.3d 933, 937 (9th Cir. 2003). Further, federal preemption is an issue of law, which we review de novo. *Id.*

A.

Under Article VI of the Constitution, the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Accordingly, it is axiomatic "that state law that conflicts with federal law is 'without effect.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d

407 (1992) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981)).

Federal law may preempt state law under the Supremacy Clause in three ways. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990). First, Congress may state its intent through an express preemption statutory provision. *Id.* at 78-79. Second, "in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *Id.* at 79.

> Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

Id. (alterations in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Finally, state law that actually conflicts with federal law is preempted. *Id.* "Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citation and quotation omitted). In considering whether any of these three categories of preemption apply, however, "'[t]he purpose of Congress is the ultimate touchstone' of pre-emption analysis." *Cipollone*, 505 U.S. at 516 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

Further, "[w]here federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 813 n. 8 (1997) (internal quotations omitted); *Rice*, 331 U.S. at 230. The presumption of non-preemption does not apply, however, "when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke*, 529 U.S. 89, 108 (2000); *see also Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 496 (9th Cir. 2005). Here, although we recognize that there is a significant federal presence in the regulation of national banks, *see Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 559 (9th Cir. 2002), WLAD was enacted pursuant to the State's historic police powers to prohibit discrimination on specified grounds. *See* Wash. Rev. Code § 49.60.010. Thus, we begin with the presumption that Congress did not intend the National Bank Act to preempt the WLAD. *Cf. PG & E Co. v. California*, 350 F.3d 932, 943 (9th Cir. 2003) (holding that presumption against preemption of generally applicable state law applies in bankruptcy area); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1328-29 (11th Cir. 2001) ("Although the federal government through the ICCTA has legislated in an area where there has been a history of significant federal presence, . . . West Palm Beach is acting under the traditionally local police power of zoning and health and safety regulation." (footnote, citation and quotation omitted)).

B.

The at-pleasure provision of § 24(Fifth) is part of the scheme of federal laws governing the duties and powers of federally chartered banks. "Congress has legislated in the field of banking from the days of *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), creating an extensive federal statutory and regulatory scheme." *Bank of Am.*, 309 F.3d at 558. The purpose of this scheme was "to facilitate what Representative Hooper termed a 'national banking system,'" *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 315 (1978) (footnote and citation omitted), and "to protect national banks against intrusive regulation by the States," *Bank of Am.*, 309 F.3d at 561. Accordingly, the history of national banking law is "one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily preempting, contrary state law." *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 32 (1996).

Nonetheless, "[s]ince shortly after the Bank Act was enacted in 1864, the Supreme Court has oft reiterated that federal substantive authority over national banks is not exclusive." *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 963 (9th Cir. 2005) (citation and footnote omitted). Rather, "regulation of banking has been one of dual control [with the states] since the passage of the first National Bank Act." *Nat'l State Bank v. Long*, 630 F.2d 981, 985 (3d Cir. 1980). Accordingly, federal banking statutes and regulations do not "deprive States of the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank*, 517 U.S. at 33, 116 S.Ct. 1103. State laws regulating the conduct of national banks are

void only "if they conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties." *Bank of Am.*, 309 F.3d at 561; *see also Barnett Bank*, 517 U.S. at 33-37, 116 S.Ct. 1103 (holding that a federal statute granting national banks authority to sell insurance conflicts with and therefore preempts state law forbidding banks from selling insurance); *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377-79, 74 S.Ct. 550, 98 L.Ed. 767 (1954) (holding that national banks' power to receive deposits conflicts with and therefore preempts a state statute prohibiting use of the word "savings" in banking advertisements); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248-49 (1944) (holding that a state statute providing for transfer of abandoned bank deposits was not preempted because "national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on them").

In light of the historic dual regulation of banks by state and federal law, we conclude that the district court erred in determining that the dismiss-at-pleasure provision of the National Bank Act preempts the entire field of law governing national banks' employment practices. Indeed, the at-pleasure provision is not accompanied by a pervasive regulatory scheme that governs the dismissal of bank officers, " 'the mere volume and complexity' " of which "demonstrate[s] an implicit congressional intent to displace all state law." *Bank of Am.*, 309 F.3d at 558 (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000)). Rather, the National Bank Act simply contains one undefined clause – "dismiss such officers or any of them at pleasure." 12 U.S.C. § 24(Fifth). This clause does not

reflect that Congress's clear and manifest purpose was preemption of the entire field of state law.

We therefore must determine the intended purpose and scope of the at-pleasure provision and, given that scope, whether the WLAD "conflict[s] with federal law, frustrate[s] the purposes of the National Bank Act, or impair[s] the efficiency of national banks to discharge their duties." *Bank of Am.*, 309 F.3d at 561.[2] The meaning and scope of the at-pleasure provision is not defined by statute, regulations, or legislative history. In fact, the only evidence of congressional intent regarding the purpose and scope of the National Bank Act provision is provided by case law.

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[2] In determining the intended scope of § 24(Fifth), we also consider the judicial constructions of the virtually identical dismiss-at-pleasure provisions in the Federal Reserve Act, 12 U.S.C. § 341(Fifth), and the Federal Home Loan Bank Act, 12 U.S.C. § 1432(a).

Under the Federal Reserve Act, a Federal Reserve Bank has the power "[t]o appoint by its board of directors a president, vice presidents, and such officers and employees as are not otherwise provided for in this chapter, to define their duties, require bonds for them and fix the penalty thereof, and *to dismiss at pleasure such officers or employees.*" 12 U.S.C. § 341(Fifth) (emphasis added).

Similarly, under the Federal Home Loan Bank Act, the board of directors of each Federal Home Loan Bank has the power "to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of its business, to define their duties, require bonds of them and fix the penalties thereof, and *to dismiss at pleasure such officers.*" 12 U.S.C. § 1432(a) (emphasis added).

Courts that have considered these provisions have interpreted them consistently with each other and with the at-pleasure clause of the National Bank Act. *See, e.g., Mele v. Fed. Reserve Bank*, 359 F.3d 251, 255 (3d Cir. 2004); *Arrow v. Fed. Reserve Bank*, 358 F.3d 392, 394 (6th Cir. 2004); *Inglis v. Feinerman*, 701 F.2d 97, 98 (9th Cir. 1983).

An early leading case addressing the at-pleasure clause explained the purpose of the provision as follows:

> Observation and experience alike teach that it is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are intrusted, should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them. High credit is indispensable to the success and prosperity of a bank. Without it, customers cannot be induced to deposit their moneys. When it has once been secured, and then declines, those who have deposited demand their cash, the income of the bank dwindles, and often bankruptcy follows. It sometimes happens that, without any justification, a suspicion of dishonesty or carelessness attaches to a cashier or a president of a bank, spreads through the community in which he lives, scares the depositors, and threatens immediate financial ruin to the institution. In such a case it is necessary to the prosperity and success – to the very existence – of a banking institution that the board of directors should have power to remove such an officer, and to put in his place another, in whom the community has confidence. In our opinion, the provision of the act of congress to which we have referred was inserted, ex industria, to provide for this very contingency.

Westervelt v. Mohrenstecher, 76 F. 118, 122 (8th Cir. 1896). Thus, "[t]he original congressional intent behind the at-pleasure provision of the Bank Acts was to ensure the financial stability of the banking institutions by affording them the means to discharge employees who were felt to compromise an institution's integrity." Sharon A. Kahn &

Brian McCarthy, *At-Will Employment in the Banking Industry: Ripe for a Change*, 17 Hofstra Lab. & Emp. L.J. 195, 215 (1999). Accordingly, courts uniformly have concluded that a bank's power to "dismiss at pleasure is analogous to dismiss at will, implying the absence of a contractual relationship between employer and employee." *Katsiavelos v. Fed. Reserve Bank*, 1995 WL 103308, at *2 (N.D. Ill. Mar. 3, 1995); *see also Mele*, 359 F.3d at 255; *Booth v. Old Nat'l Bank*, 900 F. Supp. 836, 843 (N.D.W. Va. 1995); *Mueller v. First Nat'l Bank*, 797 F. Supp. 656, 663 (C.D. Ill. 1992); *White v. Fed. Reserve Bank*, 660 N.E.2d 493, 496 (Ohio Ct. App. 1995); *Sargent v. Cent. Nat'l Bank & Trust Co.*, 809 P.2d 1298, 1303 (Okla. 1991).[3]

Similarly, we have concluded that the at-pleasure provision of the National Bank Act bars contract claims challenging a bank's dismissal of an officer. *See Mackey v. Pioneer Nat'l Bank*, 867 F.2d 520, 524 (9th Cir. 1989) (holding that § 24(Fifth) "has been consistently interpreted to mean that the board of directors of a national bank may dismiss an officer without liability for breach of the agreement to employ"). We further have concluded that

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[3] One commentator has argued, however, that in light of the employment law principles that were in force at the time of the enactment of the National Bank Act, the courts have erred in concluding that the at-pleasure provisions were intended to render state contractual claims void. *See* M.B.W. Sinclair, *Employment At Pleasure: An Idea Whose Time Has Passed*, 23 U. Tol. L. Rev. 531 (1992). At the time Congress enacted the National Bank Act, "if an employment contract was not for a definite term, then it was presumed to be for a year." *Id.* at 540. Thus, the "original purpose of the 'at pleasure' language of the . . . National Bank Act was to enable banks to remove officers who otherwise would be entitled, by law, to remain at least until the end of the year." *Id.* at 541. According to this argument, as at-will employment became the norm, the at-pleasure provisions became superfluous. *Id.*

"the National Bank Act raise[s] a defense to both . . . contract and tort claims." *Id.* at 525. In *Mackey*, we explained,

> it would make little sense to allow state tort claims to proceed, where a former bank officer's contract claims are barred by Section 24 (Fifth). The effect would be to substitute tort for contract claims, thus subjecting the national bank to all the dangers attendant to dismissing an officer. The purpose of the provision in the National Bank Act was to give those institutions the greatest latitude possible to hire and fire their chief operating officers, in order to maintain the public trust.

Id. at 526.

We also have held that the at-pleasure provision in the Federal Home Loan Act, 12 U.S.C. § 1432(a), bars state tort wrongful discharge claims. *See Inglis*, 701 F.2d at 97. In *Inglis*, we considered a wrongful discharge claim based upon the California law exception to at-will termination under *Tameny v. Atl. Richfield Co.*, 610 P.2d 1330 (Cal. 1980). *Inglis*, 701 F.2d at 99. We held that the plaintiff's claim, which alleged that "the reason for his termination was his insistence that the Bank conform its practices to federal law," was preempted by the Federal Home Loan Act, 12 U.S.C. § 1432(a). *Id.; see also Bollow v. Fed. Reserve Bank*, 650 F.2d 1093 (9th Cir. 1981) (holding that Federal Reserve Bank employee's claims alleging a right to a hearing before termination under state law conflicted with and were preempted by the at-pleasure provision in 12 U.S.C. § 341(Fifth)).

We again addressed a bank's authority to dismiss a bank officer under an at-pleasure provision in *Walleri v.*

Fed. Home Loan Bank, 83 F.3d 1575 (9th Cir. 1996). In *Walleri*, we concluded that the Federal Home Loan Bank Act at-pleasure provision, 12 U.S.C. § 1432(a), preempted a state wrongful discharge claim alleging that the bank wrongfully terminated the plaintiff because she prepared a report critical of the bank's lack of compliance with the federal banking laws. *Walleri*, 83 F.3d at 1578-79, 1582. We also held that Walleri's emotional distress claim was preempted. Although we recognized that the bank's power to dismiss "at pleasure" would not "necessarily preempt [] claims based on an employer's wrongful act directed at the employee outside of the employment relationship . . . , the conduct complained of [in the plaintiff's emotional distress allegations] relate[d] solely to the employment relationship." *Id.* at 1582. We therefore affirmed the dismissal of the emotional distress claim, concluding "[w]hen § 1432(a) vested power in the Federal Home Loan Banks to 'select, employ, and fix the compensation of . . . [their] employees . . . to define their duties . . . and to dismiss [them] at pleasure . . . ' it left no room for oversight under state law over the manner in which that power is exercised." *Id.* (alterations in original).

C.

In light of our past holdings delineating the preemptive scope of the banking laws' dismiss-at-pleasure provisions, the Bank argues that § 24(Fifth) also preempts Kroske's claim under the WLAD. To support this contention the Bank cites the Sixth Circuit's ruling in *Leon v. Fed. Reserve Bank*, 823 F.2d 928 (6th Cir. 1987). In *Leon*, the Sixth Circuit concluded that the Elliott-Larsen Act, Michigan's anti-discrimination statute, Mich. Comp. Laws Ann. §§ 37.2101-.2804, was preempted by the Federal

Reserve Act's at-pleasure provision, 12 U.S.C. § 341(Fifth). *Leon*, 823 F.2d at 931. With little analysis of the issue, the court concluded that the at-pleasure provision "preempts any state-created employment right to the contrary," including the plaintiff's claim under the state anti-discrimination law. *Id.; see also Arrow*, 358 F.3d at 393 (applying *Leon* and holding that a state anti-discrimination claim was preempted).

We disagree with the Sixth Circuit's summary conclusion that state anti-discrimination statutes enacted under a state's police powers are preempted by the banking laws simply because they are part of a general category of "state-created employment right[s]." Unlike the cases involving state common law employment claims, here we are confronted with a state statute prohibiting discrimination, which is modeled after and incorporated into the federal anti-discrimination laws. Thus, federal preemption of the WLAD must be considered in light of Congress's enactment of relevant federal employment discrimination laws and the cooperative state-federal anti-discrimination scheme.[4]

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[4] We note that in *Moodie v. Fed. Reserve Bank*, 831 F. Supp. 333, 337 (S.D.N.Y. 1993), the district court similarly rejected the Sixth Circuit's holding in *Leon*, 823 F.2d at 932. In *Moodie*, the district court concluded,

> [n]othing in the plain language of [12 U.S.C.] § 341[, which authorizes Reserve Banks to dismiss certain officers and employees "at pleasure,"] supports the Bank's view that Congress intended that section to exempt the Federal Reserve Banks, in the area of employment discrimination, from statutes or regulations of the states in which they operate, particularly when the state statutory scheme is consistent with federal legislation.

831 F. Supp. at 337. The court held that "[t]he New York State Human Rights Law, with provisions analogous to Title VII, creates no additional

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Federal anti-discrimination statutes are relevant to our inquiry because federally chartered banks are not exempt from liability under these laws. *See Cooper v. Fed. Reserve Bank*, 467 U.S. 867 (1984) (holding that members of a class of black employees of a Federal Reserve Bank could maintain separate actions against the bank under Title VII); *see also* Enforcement Guidance on Coverage of Federal Reserve Banks, EEOC Decision No. N-915-002 (1993) (concluding that Federal Reserve Banks are not executive agencies and are covered by Title VII, the ADEA, the Equal Pay Act ("EPA"), and the Americans with Disabilities Act ("ADA") as private employers). Indeed, courts that have addressed the issue consistently have held that banks are subject to liability for discrimination under federal anti-discrimination laws irrespective of the bank's right to dismiss an officer (or employee) "at pleasure." *See, e.g., Leon*, 823 F.2d at 931 (noting that plaintiff could have brought her discrimination claim under Title VII); *Diniz v. Fed. Reserve Bank*, 2004 WL 2043127, at *2 (N.D. Cal. Sept. 13, 2004) (holding that the Federal Reserve Bank may be sued for violations of Title VII); *Mueller*, 797 F. Supp. at 663 (holding that § 24(Fifth) does not bar a discrimination claim under the ADEA).

Here, because Kroske has alleged age discrimination under the WLAD, we are particularly concerned with the congressional intent expressed in the enactment of the

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employment rights in conflict with the Bank's status as an employer at will, nor does it place additional constraints on the Bank's exercise of its statutory powers." *Id.; see also Moodie v. Fed. Reserve Bank*, 835 F. Supp. 751, 753 (S.D.N.Y. 1993) (denying motion to reargue motion for summary judgment, concluding that "Congress did not intend 12 U.S.C. § 341(5) to preempt state anti-discrimination laws that are consistent with federal anti-discrimination legislation").

ADEA, which prohibits discrimination in employment on the basis of age. *See* 29 U.S.C. § 623. The ADEA is part of "an ongoing congressional effort to eradicate discrimination in the workplace, [and] reflects a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995). Accordingly, the ADEA shares a common purpose with Title VII,[5] the paramount federal anti-discrimination statute: to eliminate discrimination in employment and to remedy the effects of such discriminatory conduct. *Id.* at 358. Because the anti-discrimination laws are part of a consistent remedial scheme, "[t]he substantive, anti-discrimination provisions of the ADEA are modeled upon the prohibitions of Title VII." *Id.* at 357; *see also Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

The anti-discrimination provisions of the ADEA conflict with the banks' authority to dismiss officers "at pleasure." As a result, we must give effect to the congressional intent expressed in the ADEA by limiting the power granted to banks through § 24(Fifth). We recognize that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). We have held, however, that § 24(Fifth) grants banks "the greatest latitude possible to hire and fire their chief operating officers." *Mackey*, 867 F.2d at 526. In light of the broad power extended to banks to dismiss officers "at pleasure" without limitation, we are not able to harmonize

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[5] Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2.

§ 24(Fifth) with the ADEA's prohibition against discrimination.

Rather, we conclude that the two provisions are in irreconcilable conflict with regard to the banks' power to dismiss an officer on the basis of age. "There is no ambiguity as to the nature of the remedial scheme Congress enacted in [the ADEA], and that scheme simply cannot work if [§ 24(Fifth)] is allowed to operate concurrently." *Kee Leasing Co. v. McGahan* (*In re Glacier Bay*), 944 F.2d 577, 583 (9th Cir. 1991). Although "repeals by implication are not favored," *Morton*, 417 U.S. at 549 (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497 (1936)), where "'provisions in the two acts[, such as the provisions at issue,] are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one.'" *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (quoting *Posadas*, 296 U.S. at 503).

However, when, as here, "two statutes are partially in conflict, '[r]epeal is to be regarded as implied . . . only to the minimum extent necessary.'" *In re Glacier Bay*, 944 F.2d at 582 (first alteration in original) (quoting *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963)). We therefore conclude that the dismiss-at-pleasure provision of § 24(Fifth) is repealed by implication only to the extent necessary to give effect to the ADEA; accordingly, the authority to dismiss officers "at pleasure" does not encompass the right to terminate an officer in a manner that violates the prohibitions against discrimination enumerated in the ADEA.

It follows that the provision of the WLAD prohibiting age discrimination does not conflict with the at-pleasure provision of the National Bank Act. The WLAD provides

that it is an unfair practice for any employer "[t]o discharge or bar any person from employment because of age." Wash. Rev. Code § 49.60.180(2). This provision mirrors the substantive provisions of the ADEA and is interpreted consistently with the ADEA. *See Anderson v. Pac. Mar. Ass'n*, 336 F.3d 924, 926 n. 1 (9th Cir. 2003) ("Washington's Law Against Discrimination tracks federal law. . . . "); *Grimwood v. Univ. of Puget Sound, Inc.*, 753 P.2d 517, 520 (1988) (holding that because Wash. Rev. Code § 49.60.180 "does not provide any criteria for establishing an age discrimination case," Washington courts look to federal cases construing the ADEA). Thus, in the absence of clear congressional intent to the contrary, we hold that Kroske's claim of age discrimination under the WLAD is not preempted by § 24(Fifth), as limited by the ADEA. *Cf. Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 101-06 (1983) (holding that state anti-discrimination laws are not expressly preempted by ERISA insofar as they are consistent with Title VII); *Aloha Islandair Inc. v. Tseu*, 128 F.3d 1301, 1303 (9th Cir. 1997) (concluding that state disability law is not preempted by the Airline Deregulation Act based, in part, on the fact that pilots are not exempt from the Americans with Disabilities Act).

Our conclusion is buttressed by the "importance of state fair employment laws to the federal enforcement scheme." *Shaw*, 463 U.S. at 102. Certainly, "many States look to Title VII[, the model for the ADEA,] as a matter of course in defining the scope of their laws." *Id.* at 106. Moreover, parallel state anti-discrimination laws are explicitly made part of the enforcement scheme for the federal laws. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-56 (1979); *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1303 n. 1 (9th Cir. 1994). Not only does the

ADEA disclaim any preemptive effect on state laws, *see* 29 U.S.C. § 633(a), it also incorporates consistent state anti discrimination laws to serve as the primary enforcement mechanism of the enumerated rights, *see id.* §§ 626(d)(2), 633(b).

Indeed, the ADEA, like Title VII, provides that, in states with anti-discrimination laws that prohibit the conduct the complainant alleges, the state administrative agency has exclusive jurisdiction over a charge of discrimination for the first sixty days after the charge is filed. *See id.* § 633(b); *see also Oscar Mayer & Co.*, 441 U.S. at 755 (stating that § 14(b) of the ADEA, 29 U.S.C. § 633(b), was "patterned after and is virtually in *haec verba* with § 706(c) of Title VII," 42 U.S.C. § 2000e-5(c)). Congress intended for these provisions "to screen from the federal courts those problems of civil rights that could be settled to the satisfaction of the grievant in 'a voluntary and localized manner.'" *Id.* (quoting 110 Cong. Rec. 12725 (1964) (remarks of Sen. Humphrey)). They were "intended to give state agencies a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary, resort to federal relief by victims of the discrimination." *Id.*

Here, Kroske brought her suit under the WLAD, which, pursuant to the State's police powers,

> declares that practices of discrimination against any of [Washington's] inhabitants because of race, creed, color, national origin, families with children, sex, marital status, *age*, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person are a matter of state concern, that such discrimination threatens not only

> the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

Wash. Rev. Code § 49.60.010 (emphasis added). It further creates the Washington Human Rights Commission, a designated Fair Employment Practices ("FEP") agency under 29 C.F.R. § 1601.74, and grants the agency general jurisdiction and necessary "powers with respect to elimination and prevention of discrimination." Wash. Rev. Code. § 49.60.010.

Specifically, as discussed, Kroske alleges that the Bank terminated her in violation of the WLAD, *id.* § 49.60.180(2), which provides that it is an unfair practice for any employer "[t]o discharge or bar any person from employment because of age."[6] This provision is consistent with the substantive provisions of the ADEA and plays an integral role in the enforcement of the federal anti-discrimination scheme. *See Oscar Mayer & Co.*, 441 U.S. at 756. The nature of the collaborative anti-discrimination scheme and the WLAD's

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[6] Wash. Rev. Code § 49.44.090 further provides, in relevant part:

> It shall be an unfair practice (1) For an employer or licensing agency, because an individual is forty years of age or older, to refuse to hire or employ or license or to bar or to terminate from employment such individual, or to discriminate against such individual in promotion, compensation or in terms, conditions or privileges of employment: PROVIDED, That employers or licensing agencies may establish reasonable minimum and/or maximum age limits with respect to candidates for positions of employment, which positions are of such a nature as to require extraordinary physical effort, endurance, condition or training, subject to the approval of the executive director of the Washington state human rights commission or the director of labor and industries through the division of industrial relations.

function in it supports our conclusion that Kroske's age discrimination claim, which is substantively the same as a claim of age discrimination under the ADEA, is not preempted by the Bank's power to dismiss officers "at pleasure" under § 24(Fifth).

We are mindful, however, of Congress's intent to create a national banking system with "uniform and universal operation through the entire territorial limits of the country." *Talbott v. Bd. of Comm'rs*, 139 U.S. 438, 443 (1891). We therefore recognize that state law prohibitions against discriminatory termination that are not consistent with federal anti-discrimination laws may frustrate the congressional purpose of uniform regulation reflected in the National Bank Act. Nonetheless, the fact that some state law provisions prohibit termination on grounds that are more expansive than the grounds set forth in federal law does not undermine our conclusion that Kroske's age discrimination claim under the WLAD, which substantively mirrors a claim under the ADEA, is not preempted. *Cf. Shaw*, 463 U.S. at 101-06 (holding that New York's Human Rights Law is not preempted under ERISA insofar as it prohibits practices that are covered under Title VII).

In sum, we conclude that the congressional enactment of the ADEA has placed limits on the Bank's authority to dismiss officers "at pleasure" under § 24(Fifth). In light of the ADEA's prohibition against age discrimination and the integral role of state anti-discrimination laws in the federal anti-discrimination scheme, we conclude that Congress did not intend for § 24(Fifth) to preempt the WLAD employment discrimination provisions, at least insofar as they are consistent with the prohibited grounds for termination under the ADEA. Thus, Kroske's claim of age discrimination under the WLAD is not barred.

IV. Conclusion

We conclude that diversity jurisdiction is proper. We also conclude that Kroske's age discrimination claim under the WLAD is not preempted by the National Bank Act. We therefore reverse the district court's grant of summary judgment in favor of U.S. Bank Corp. and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

APPENDIX B

432 F.3d 976

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KATHY KROSKE, an individual,
Plaintiff-Appellant,

v.

US BANK CORP., a foreign corporation; dba US BANK
Defendants-Appellees.

No. 04-35187

D.C. No.
CV-02-00439-RHW

OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Robert H. Whaley, District Judge, Presiding

Argued and Submitted
July 15, 2005 – Seattle, Washington

Filed December 23, 2005

Before: A. Wallace Tashima, Richard A. Paez, and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge Paez

COUNSEL

Christine M. Weaver & Sean D. Jackson, Miller, Devlin, McLean & Weaver, P.S., Spokane, Washington, for the plaintiff-appellant.

Thomas Bassett & Angel Rains, Lukins & Annis P.S., Spokane, Washington, for the defendant-appellant.

OPINION

PAEZ, Circuit Judge:

Kathy Kroske appeals the district court's order granting Defendant U.S. Bank Corp.'s motion for summary judgment, dismissing Kroske's age discrimination claim under the Washington Law Against Discrimination ("WLAD"), Wash. Rev. Code §§ 49.60.010-.400. Kroske first contends that the district court erroneously concluded that the amount in controversy exceeded $75,000 and therefore improperly determined that it had diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1). Kroske further argues that the district court erroneously concluded that the National Bank Act, 12 U.S.C. §§ 21-216d, preempts her age discrimination claim under the WLAD. We have jurisdiction under 28 U.S.C. § 1291. We conclude that diversity jurisdiction is proper and that Kroske's age discrimination claim under the WLAD was not preempted. Accordingly, we reverse and remand.

I. Background

U.S. Bank Corp., a Delaware corporation, is a federally chartered National Banking Association that was formed in accordance with the National Bank Act, 12 U.S.C. § 21. The Bank is governed by a board of directors, which is empowered by the Bank's bylaws to elect and discharge officers.

Kathy Kroske began working for the Bank in 1977 as a teller. On April 20, 1993, the Bank's board of directors elected Kroske as an officer in the role of Assistant Vice President. During restructuring due to a merger, the Bank changed Kroske's position from retail market manager to manager of the Manito bank branch in Spokane, Washington. As

manager, Kroske was notified that her branch was not meeting the Bank's goals and quotas for business activity. Although Kroske contends that her branch was the smallest in the area with the fewest employees, and that she was short-staffed, the Bank continued to insist that her branch meet fixed business activity levels and warned that she would be disciplined if it did not. Ultimately, in July 2002, the Bank terminated Kroske for allegedly failing to meet the daily performance goals. The board of directors subsequently ratified Kroske's termination in a meeting convened in Minneapolis, Minnesota.

Kroske filed suit in Washington State Superior Court against the Bank. She alleged that at the time of her termination, the other branch managers in the region were in their twenties and thirties, while Kroske was fifty-one years old. Further, the Bank allegedly gave these younger managers a reasonable opportunity to meet the business activity goals and denied Kroske such an opportunity. In addition, Kroske contended that she was replaced by an employee who was in his mid-twenties and possessed less experience than Kroske. Kroske therefore alleged that the Bank had terminated her on the basis of her age in violation of the WLAD, and sought damages, as well as attorney's fees and costs. In her complaint, Kroske did not allege any federal causes of action.

The Bank removed the case to federal court and, once in federal court, filed a motion for summary judgment arguing that Kroske's state discrimination claim was preempted by the National Bank Act, specifically 12 U.S.C. § 24(Fifth), which grants national banks the power to dismiss officers "at pleasure." Kroske opposed the motion, contending that she was not an officer under § 24(Fifth) and, in the alternative, that the National Bank

Act did not preempt her age discrimination claim under the WLAD.

The district court granted the Bank's motion for summary judgment. The court held that Kroske qualified as an "officer" under the National Bank Act. Further, the district court concluded that § 24(Fifth) preempts the field of law regulating the Bank's employment practices and therefore preempted Kroske's age discrimination claim under the WLAD. Kroske timely appealed, challenging the district court's jurisdiction and the grant of summary judgment.

II. Amount In Controversy

Kroske first contends that removal of her case to federal court was improper because the district court lacked diversity jurisdiction under 28 U.S.C. § 1332.[1] She argues that the Bank did not meet its burden of establishing that the amount in controversy exceeded $75,000. "We review de novo a district court's determination that diversity jurisdiction exists." *Breitman v. May Co. Cal.*, 37 F.3d 562, 563 (9th Cir. 1994). The factual determinations necessary to establish diversity jurisdiction are reviewed for clear error. *Co-Efficient Energy Sys. v. CSL Indus., Inc.*, 812 F.2d 556, 557 (9th Cir. 1987).

Where, as here, "the complaint does not demand a dollar amount, the removing defendant bears the burden of proving by a preponderance of evidence that the amount

[1] 28 U.S.C. § 1332(a)(1) provides, in relevant part, "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States."

in controversy exceeds $[75],000." *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 376 (9th Cir. 1997); *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 839 (9th Cir. 2002). The amount in controversy includes the amount of damages in dispute, as well as attorney's fees, if authorized by statute or contract. *See Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1155-56 (9th Cir. 1998). When the amount is not "facially apparent" from the complaint, "the court may consider facts in the removal petition, and may 'require parties to submit summary-judgment-type evidence relevant to the amount in controversy at the time of removal.'" *Singer*, 116 F.3d at 377 (quoting *Allen v. R & H Oil & Gas Co.*, 63 F.3d 1326, 1335-36 (5th Cir. 1995)).

Here, Kroske's complaint alleged that "she suffered and continues to suffer economic and emotion [sic] injuries and other damages, with specific amounts to be proven at the time of trial." In response to the Bank's interrogatories, Kroske further identified the following categories of damages: lost wages, benefits including but not limited to health and mental insurance, 401(k) contributions, value of life insurance policies, stock options, and emotional distress damages, as well as attorney's fees and costs. Kroske did not, however, allege the amount of damages or fees she sought.

In determining the amount in controversy, the district court properly considered Kroske's interrogatory answers and emotional distress damage awards in similar age discrimination cases in Washington. *See De Aguilar v. Boeing Co.*, 11 F.3d 55, 58 (5th Cir. 1993). Based upon a preponderance of the evidence, the court concluded that Kroske's lost wages amounted to at least $55,000, that her 401(k) contribution amounted to at least $1000, and that her emotional distress damages would add at least an

additional $25,000 to her claim. Therefore, even without including a potential award of attorney's fees, the district court found that the amount in controversy exceeded $75,000. This finding was not clearly erroneous; diversity jurisdiction properly exists in this case.

III. Preemption

Kroske contends that the district court erred in concluding that her age discrimination claim under the WLAD, Wash. Rev. Code § 49.60.180, was preempted by the National Bank Act. The National Bank Act provides that a national bank shall have the power "[t]o elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, *dismiss such officers or any of them at pleasure,* and appoint others to fill their places." 12 U.S.C. § 24(Fifth) (emphasis added). Kroske concedes that she was appointed and terminated by the board of directors and does not challenge the district court's determination that she was an "officer" under 12 U.S.C. § 24(Fifth). Kroske contends, however, that the district court erred in determining that her state law age discrimination claim is preempted by the dismiss-at-pleasure provision of § 24(Fifth). We agree.

"We review a district court's grant of summary judgment de novo." *Winterrowd v. Am. Gen. Annuity Ins. Co.*, 321 F.3d 933, 937 (9th Cir. 2003). Further, federal preemption is an issue of law, which we review de novo. *Id.*

A.

Under Article VI of the Constitution, the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Accordingly, it is axiomatic "that state law that conflicts with federal law is 'without effect.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

Federal law may preempt state law under the Supremacy Clause in three ways. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990). First, Congress may state its intent through an express preemption statutory provision. *Id.* at 78-79. Second, "in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *Id.* at 79.

> Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

Id. (alterations in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Finally, state law that actually conflicts with federal law is preempted. *Id.* "Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* (citation and

quotation omitted). In considering whether any of these three categories of preemption apply, however, "'[t]he purpose of Congress is the ultimate touchstone' of preemption analysis." *Cipollone,* 505 U.S. at 516 (quoting *Malone v. White Motor Corp.,* 435 U.S. 497, 504 (1978)).

Further, "[w]here federal law is said to bar state action in fields of traditional state regulation . . . we have worked on the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund,* 520 U.S. 806, 813 n.8 (1997) (internal quotations omitted); *Rice,* 331 U.S. at 230. The presumption of non-preemption does not apply, however, "when the State regulates in an area where there has been a history of significant federal presence." *United States v. Locke,* 529 U.S. 89, 108 (2000); *see also Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n,* 410 F.3d 492, 496 (9th Cir. 2005). Here, although we recognize that there is a significant federal presence in the regulation of national banks, *see Bank of Am. v. City & County of San Francisco,* 309 F.3d 551, 559 (9th Cir. 2002), WLAD was enacted pursuant to the State's historic police powers to prohibit discrimination on specified grounds. *See* Wash. Rev. Code § 49.60.010. Thus, we begin with the presumption that Congress did not intend the National Bank Act to preempt the WLAD. *Cf. PG & E Co. v. California,* 350 F.3d 932, 943 (9th Cir. 2003) (holding that presumption against preemption of generally applicable state law applies in bankruptcy area); *Fla. E. Coast Ry. Co. v. City of W. Palm Beach,* 266 F.3d 1324, 1328-29 (11th Cir. 2001) ("Although the federal government through the ICCTA has legislated in an area where there has been a history of significant

federal presence, . . . West Palm Beach is acting under the traditionally local police power of zoning and health and safety regulation." (footnote, citation and quotation omitted)).

B.

The at-pleasure provision of § 24(Fifth) is part of the scheme of federal laws governing the duties and powers of federally chartered banks. "Congress has legislated in the field of banking from the days of *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 . . . (1819), creating an extensive federal statutory and regulatory scheme." *Bank of Am.*, 309 F.3d at 558. The purpose of this scheme was "to facilitate what Representative Hooper termed a 'national banking system,'" *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 315 (1978) (footnote and citation omitted), and "to protect national banks against intrusive regulation by the States," *Bank of Am.*, 309 F.3d at 561. Accordingly, the history of national banking law is "one of interpreting grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily preempting, contrary state law." *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 32 (1996).

Nonetheless, "[s]ince shortly after the Bank Act was enacted in 1864, the Supreme Court has oft reiterated that federal substantive authority over national banks is not exclusive." *Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 963 (9th Cir. 2005) (citation and footnote omitted). Rather, "regulation of banking has been one of dual control [with the states] since the passage of the first National Bank Act." *Nat'l State Bank v. Long*, 630 F.2d 981, 985 (3d Cir.

1980). Accordingly, federal banking statutes and regulations do not "deprive States of the power to regulate national banks, where . . . doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank*, 517 U.S. at 33. State laws regulating the conduct of national banks are void only "if they conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties." *Bank of Am.*, 309 F.3d at 561; *see also Barnett Bank*, 517 U.S. at 33-37 (holding that a federal statute granting national banks authority to sell insurance conflicts with and therefore preempts state law forbidding banks from selling insurance); *Franklin Nat'l Bank v. New York*, 347 U.S. 373, 377-79 (1954) (holding that national banks' power to receive deposits conflicts with and therefore preempts a state statute prohibiting use of the word "savings" in banking advertisements); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 248-49 (1944) (holding that a state statute providing for transfer of abandoned bank deposits was not preempted because "national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on them").

In light of the historic dual regulation of banks by state and federal law, we conclude that the district court erred in determining that the dismiss-at-pleasure provision of the National Bank Act preempts the entire field of law governing national banks' employment practices. Indeed, the at-pleasure provision is not accompanied by a pervasive regulatory scheme that governs the dismissal of bank officers, "'the mere volume and complexity'" of which "demonstrate[s] an implicit congressional intent to displace all state law." *Bank of Am.*, 309 F.3d at 558 (quoting

Geier v. Am. Honda Motor Co., 529 U.S. 861, 884 (2000)). Rather, the National Bank Act simply contains one undefined clause – "dismiss such officers or any of them at pleasure." 12 U.S.C. § 24(Fifth). This clause does not reflect that Congress's clear and manifest purpose was preemption of the entire field of state law.

We therefore must determine the intended purpose and scope of the at-pleasure provision and, given that scope, whether the WLAD "conflict[s] with federal law, frustrate[s] the purposes of the National Bank Act, or impair[s] the efficiency of national banks to discharge their duties." *Bank of Am.*, 309 F.3d at 561.[2] The meaning and scope of the at-pleasure provision is not defined by statute, regulations, or legislative history. In fact, the only evidence of congressional intent regarding the purpose and

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[2] In determining the intended scope of § 24(Fifth), we also consider the judicial constructions of the virtually identical dismiss-at-pleasure provisions in the Federal Reserve Act, 12 U.S.C. § 341(Fifth), and the Federal Home Loan Bank Act, 12 U.S.C. § 1432(a).

Under the Federal Reserve Act, a Federal Reserve Bank has the power "[t]o appoint by its board of directors a president, vice presidents, and such officers and employees as are not otherwise provided for in this chapter, to define their duties, require bonds for them and fix the penalty thereof, and *to dismiss at pleasure such officers or employees.*" 12 U.S.C. § 341(Fifth) (emphasis added).

Similarly, under the Federal Home Loan Bank Act, the board of directors of each Federal Home Loan Bank has the power "to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of its business, to define their duties, require bonds of them and fix the penalties thereof, and *to dismiss at pleasure such officers.*" 12 U.S.C. § 1432(a) (emphasis added).

Courts that have considered these provisions have interpreted them consistently with each other and with the at-pleasure clause of the National Bank Act. *See, e.g., Mele v. Fed. Reserve Bank*, 359 F.3d 251, 255 (3d Cir. 2004); *Arrow v. Fed. Reserve Bank*, 358 F.3d 392, 394 (6th Cir. 2004); *Inglis v. Feinerman*, 701 F.2d 97, 98 (9th Cir. 1983).

scope of the National Bank Act provision is provided by case law.

An early leading case addressing the at-pleasure clause explained the purpose of the provision as follows:

> Observation and experience alike teach that it is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are intrusted, should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them. High credit is indispensable to the success and prosperity of a bank. Without it, customers cannot be induced to deposit their moneys. When it has once been secured, and then declines, those who have deposited demand their cash, the income of the bank dwindles, and often bankruptcy follows. It sometimes happens that, without any justification, a suspicion of dishonesty or carelessness attaches to a cashier or a president of a bank, spreads through the community in which he lives, scares the depositors, and threatens immediate financial ruin to the institution. In such a case it is necessary to the prosperity and success – to the very existence – of a banking institution that the board of directors should have power to remove such an officer, and to put in his place another, in whom the community has confidence. In our opinion, the provision of the act of congress to which we have referred was inserted, ex industria, to provide for this very contingency.

Westervelt v. Mohrenstecher, 76 F. 118, 122 (8th Cir. 1896). Thus, "[t]he original congressional intent behind the at-pleasure provision of the Bank Acts was to ensure the

financial stability of the banking institutions by affording them the means to discharge employees who were felt to compromise an institution's integrity." Sharon A. Kahn & Brian McCarthy, *At-Will Employment in the Banking Industry: Ripe for a Change,* 17 Hofstra Lab. & Emp. L.J. 195, 215 (1999). Accordingly, courts uniformly have concluded that a bank's power to "dismiss at pleasure is analogous to dismiss at will, implying the absence of a contractual relationship between employer and employee." *Katsiavelos v. Fed. Reserve Bank,* 1995 WL 103308, at *2 (N.D. Ill. Mar. 3, 1995); *see also Mele,* 359 F.3d at 255; *Booth v. Old Nat'l Bank,* 900 F. Supp. 836, 843 (N.D. W. Va. 1995); *Mueller v. First Nat'l Bank,* 797 F. Supp. 656, 663 (C.D. Ill. 1992); *White v. Fed. Reserve Bank,* 660 N.E.2d 493, 496 (Ohio Ct. App. 1995); *Sargent v. Cent. Nat'l Bank & Trust Co.,* 809 P.2d 1298, 1303 (Okla. 1991).[3]

Similarly, we have concluded that the at-pleasure provision of the National Bank Act bars contract claims challenging a bank's dismissal of an officer. *See Mackey v. Pioneer Nat'l Bank,* 867 F.2d 520, 524 (9th Cir. 1989) (holding that § 24(Fifth) "has been consistently interpreted

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[3] One commentator has argued, however, that in light of the employment law principles that were in force at the time of the enactment of the National Bank Act, the courts have erred in concluding that the at-pleasure provisions were intended to render state contractual claims void. *See* M.B.W. Sinclair, *Employment At Pleasure: An Idea Whose Time Has Passed,* 23 U. Tol. L. Rev. 531 (1992). At the time Congress enacted the National Bank Act, "if an employment contract was not for a definite term, then it was presumed to be for a year." *Id.* at 540. Thus, the "original purpose of the 'at pleasure' language of the . . . National Bank Act was to enable banks to remove officers who otherwise would be entitled, by law, to remain at least until the end of the year." *Id.* at 541. According to this argument, as at-will employment became the norm, the at-pleasure provisions became superfluous. *Id.*

to mean that the board of directors of a national bank may dismiss an officer without liability for breach of the agreement to employ"). We further have concluded that "the National Bank Act raise[s] a defense to both . . . contract and tort claims." *Id.* at 525. In *Mackey,* we explained,

> it would make little sense to allow state tort claims to proceed, where a former bank officer's contract claims are barred by Section 24 (Fifth). The effect would be to substitute tort for contract claims, thus subjecting the national bank to all the dangers attendant to dismissing an officer. The purpose of the provision in the National Bank Act was to give those institutions the greatest latitude possible to hire and fire their chief operating officers, in order to maintain the public trust.

Id. at 526.

We also have held that the at-pleasure provision in the Federal Home Loan Act, 12 U.S.C. § 1432(a), bars state tort wrongful discharge claims. *See Inglis,* 701 F.2d at 97. In *Inglis,* we considered a wrongful discharge claim based upon the California law exception to at-will termination under *Tameny v. Atl. Richfield Co.,* 610 P.2d 1330 (Cal. 1980). *Inglis,* 701 F.2d at 99. We held that the plaintiff's claim, which alleged that "the reason for his termination was his insistence that the Bank conform its practices to federal law," was preempted by the Federal Home Loan Act, 12 U.S.C. § 1432(a). *Id.*; *see also Bollow v. Fed. Reserve Bank,* 650 F.2d 1093 (9th Cir. 1981) (holding that Federal Reserve Bank employee's claims alleging a right to a hearing before termination under state law

conflicted with and were preempted by the at-pleasure provision in 12 U.S.C. § 341(Fifth)).

We again addressed a bank's authority to dismiss a bank officer under an at-pleasure provision in *Walleri v. Fed. Home Loan Bank*, 83 F.3d 1575 (9th Cir. 1996). In *Walleri*, we concluded that the Federal Home Loan Bank Act at-pleasure provision, 12 U.S.C. § 1432(a), preempted a state wrongful discharge claim alleging that the bank wrongfully terminated the plaintiff because she prepared a report critical of the bank's lack of compliance with the federal banking laws. *Walleri*, 83 F.3d at 1578-79, 1582. We also held that Walleri's emotional distress claim was preempted. Although we recognized that the bank's power to dismiss "at pleasure" would not "necessarily preempt [] claims based on an employer's wrongful act directed at the employee outside of the employment relationship . . . , the conduct complained of [in the plaintiff's emotional distress allegations] relate[d] solely to the employment relationship." *Id.* at 1582. We therefore affirmed the dismissal of the emotional distress claim, concluding "[w]hen § 1432(a) vested power in the Federal Home Loan Banks to 'select, employ, and fix the compensation of . . . [their] employees . . . to define their duties . . . and to dismiss [them] at pleasure . . . ' it left no room for oversight under state law over the manner in which that power is exercised." *Id.* (alterations in original).

C.

In light of our past holdings delineating the preemptive scope of the banking laws' dismiss-at-pleasure provisions, the Bank argues that § 24(Fifth) also preempts Kroske's claim under the WLAD. To support this contention the

Bank cites the Sixth Circuit's ruling in *Leon v. Fed. Reserve Bank,* 823 F.2d 928 (6th Cir. 1987). In *Leon,* the Sixth Circuit concluded that the Elliott-Larsen Act, Michigan's anti-discrimination statute, Mich. Comp. Laws Ann. §§ 37.2101-.2804, was preempted by the Federal Reserve Act's at-pleasure provision, 12 U.S.C. § 341(Fifth). *Leon,* 823 F.2d at 931. With little analysis of the issue, the court concluded that the at-pleasure provision "preempts any state-created employment right to the contrary," including the plaintiff's claim under the state anti-discrimination law. *Id.; see also Arrow,* 358 F.3d at 393 (applying *Leon* and holding that a state anti-discrimination claim was preempted).

We disagree with the Sixth Circuit's summary conclusion that state anti-discrimination statutes enacted under a state's police powers are preempted by the banking laws simply because they are part of a general category of "state-created employment right[s]." Unlike the cases involving state common law employment claims, here we are confronted with a state statute prohibiting discrimination, which is modeled after and incorporated into the federal anti-discrimination laws. Thus, federal preemption of the WLAD must be considered in light of Congress's enactment of relevant federal employment discrimination laws and the cooperative state-federal anti-discrimination scheme.[4]

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[4] We note that in *Moodie v. Fed. Reserve Bank,* 831 F.Supp. 333, 337 (S.D.N.Y. 1993), the district court similarly rejected the Sixth Circuit's holding in *Leon,* 823 F.2d at 932. In *Moodie,* the district court concluded,

> [n]othing in the plain language of [12 U.S.C.] § 341[, which authorizes Reserve Banks to dismiss certain officers and

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Federal anti-discrimination statutes are relevant to our inquiry because federally chartered banks are not exempt from liability under these laws. *See Cooper v. Fed. Reserve Bank*, 467 U.S. 867 (1984) (holding that members of a class of black employees of a Federal Reserve Bank could maintain separate actions against the bank under Title VII); *see also* Enforcement Guidance on Coverage of Federal Reserve Banks, EEOC Decision No. N-915-002 (1993) (concluding that Federal Reserve Banks are not executive agencies and are covered by Title VII, the ADEA, the Equal Pay Act ("EPA"), and the Americans with Disabilities Act ("ADA") as private employers). Indeed, courts that have addressed the issue consistently have held that banks are subject to liability for discrimination under federal anti-discrimination laws irrespective of the bank's right to dismiss an officer (or employee) "at pleasure." *See, e.g., Leon*, 823 F.2d at 931 (noting that plaintiff could have brought her discrimination claim under Title VII); *Diniz v. Fed. Reserve Bank*, 2004 WL 2043127, at *2 (N.D. Cal. Sept. 13, 2004) (holding that the Federal

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employees "at pleasure,"] supports the Bank's view that Congress intended that section to exempt the Federal Reserve Banks, in the area of employment discrimination, from statutes or regulations of the states in which they operate, particularly when the state statutory scheme is consistent with federal legislation.

831 F. Supp. at 337. The court held that "[t]he New York State Human Rights Law, with provisions analogous to Title VII, creates no additional employment rights in conflict with the Bank's status as an employer at will, nor does it place additional constraints on the Bank's exercise of its statutory powers." *Id.; see also Moodie v. Fed. Reserve Bank*, 835 F. Supp. 751, 753 (S.D.N.Y. 1993) (denying motion to reargue motion for summary judgment, concluding that "Congress did not intend 12 U.S.C. § 341(5) to preempt state anti-discrimination laws that are consistent with federal anti-discrimination legislation").

Reserve Bank may be sued for violations of Title VII); *Mueller,* 797 F.Supp. at 663 (holding that § 24(Fifth) does not bar a discrimination claim under the ADEA).

Here, because Kroske has alleged age discrimination under the WLAD, we are particularly concerned with the congressional intent expressed in the enactment of the ADEA, which prohibits discrimination in employment on the basis of age. *See* 29 U.S.C. § 623. The ADEA is part of "an ongoing congressional effort to eradicate discrimination in the workplace, [and] reflects a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Publ'g Co.,* 513 U.S. 352, 357 (1995). Accordingly, the ADEA shares a common purpose with Title VII,[6] the paramount federal anti-discrimination statute: to eliminate discrimination in employment and to remedy the effects of such discriminatory conduct. *Id.* at 358. Because the anti-discrimination laws are part of a consistent remedial scheme, "[t]he substantive, anti-discrimination provisions of the ADEA are modeled upon the prohibitions of Title VII." *Id.* at 357; *see also Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121 (1985).

The anti-discrimination provisions of the ADEA conflict with the banks' authority to dismiss officers "at pleasure." As a result, we must give effect to the congressional intent expressed in the ADEA by limiting the power granted to banks through § 24(Fifth). We recognize that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v.*

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[6] Title VII prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2.

Mancari, 417 U.S. 535, 551 (1974). We have held, however, that § 24(Fifth) grants banks "the greatest latitude possible to hire and fire their chief operating officers." *Mackey*, 867 F.2d at 526. In light of the broad power extended to banks to dismiss officers "at pleasure" without limitation, we are not able to harmonize § 24(Fifth) with the ADEA's prohibition against discrimination.

Rather, we conclude that the two provisions are in irreconcilable conflict with regard to the banks' power to dismiss an officer on the basis of age. "There is no ambiguity as to the nature of the remedial scheme Congress enacted in[the ADEA], and that scheme simply cannot work if [§ 24(Fifth)] is allowed to operate concurrently." *Kee Leasing Co. v. McGahan (In re Glacier Bay)*, 944 F.2d 577, 583 (9th Cir. 1991). Although "repeals by implication are not favored," *Morton*, 417 U.S. at 549 (quoting *Posadas v. Nat'l City Bank*, 296 U.S. 497 (1936)), where "'provisions in the two acts[, such as the provisions at issue,] are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one.'" *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (quoting *Posadas*, 296 U.S. at 503).

However, when, as here, "two statutes are partially in conflict, '[r]epeal is to be regarded as implied . . . only to the minimum extent necessary.'" *In re Glacier Bay*, 944 F.2d at 582 (first alteration in original) (quoting *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963)). We therefore conclude that the dismiss-at-pleasure provision of § 24(Fifth) is repealed by implication only to the extent necessary to give effect to the ADEA; accordingly, the authority to dismiss officers "at pleasure" does not encompass the right to terminate an officer in a manner that violates the

prohibitions against discrimination enumerated in the ADEA.

It follows that the provision of the WLAD prohibiting age discrimination does not conflict with the at-pleasure provision of the National Bank Act. The WLAD provides that it is an unfair practice for any employer "[t]o discharge or bar any person from employment because of age." Wash. Rev. Code § 49.60.180(2). This provision mirrors the substantive provisions of the ADEA and is interpreted consistently with the ADEA. *See Anderson v. Pac. Mar. Ass'n*, 336 F.3d 924, 926 n.1 (9th Cir. 2003) ("Washington's Law Against Discrimination tracks federal law. . . ."); *Grimwood v. Univ. of Puget Sound, Inc.*, 753 P.2d 517, 520 (Wash. 1988) (holding that because Wash. Rev. Code § 49.60.180 "does not provide any criteria for establishing an age discrimination case," Washington courts look to federal cases construing the ADEA). Thus, in the absence of clear congressional intent to the contrary, we hold that Kroske's claim of age discrimination under the WLAD is not preempted by § 24(Fifth), as limited by the ADEA.[6] *Cf. Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85,

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[6] We note that the California Court of Appeal reached a similar conclusion in *Marques v. Bank of Am.*, 69 Cal. Rptr. 2d 154 (Ct. App. 1998). Relying on principles of repeal by implication, the court concluded, "[s]ince, under federal law, a national bank may no longer exercise the power to dismiss at pleasure an officer who can show her termination was discriminatory, state antidiscrimination statutes prohibiting such terminations are not preempted." *Id.* at 159. Similarly, in *Peatros v. Bank of Am., NT & SA*, 990 P.2d 539 (Cal. 2000), the California Supreme Court concluded that Title VII and the ADEA impliedly amended the National Bank Act and therefore § 24(Fifth) "grants a national bank a limited power to dismiss any of its officers at pleasure by its board of directors, not extending to dismissal on the ground of race, color, religion, sex, national origin, or age." *Id.* at 551. Thus, "[a]s impliedly amended by Title VII and the ADEA, section 24,

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101-06 (1983) (holding that state anti-discrimination laws are not expressly preempted by ERISA insofar as they are consistent with Title VII); *Aloha Islandair Inc. v. Tseu*, 128 F.3d 1301, 1303 (9th Cir. 1997) (concluding that state disability law is not preempted by the Airline Deregulation Act based, in part, on the fact that pilots are not exempt from the Americans with Disabilities Act).

Our conclusion is buttressed by the "importance of state fair employment laws to the federal enforcement scheme." *Shaw*, 463 U.S. at 102. Certainly, "many States look to Title VII[, the model for the ADEA,] as a matter of course in defining the scope of their laws." *Id.* at 106. Moreover, parallel state anti-discrimination laws are explicitly made part of the enforcement scheme for the federal laws. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-56 (1979); *Prudential Ins. Co. of Am. v. Lai*, 42 F.3d 1299, 1303 n.1 (9th Cir. 1994). Not only does the ADEA disclaim any preemptive effect on state laws, *see* 29 U.S.C. § 633(a), it also incorporates consistent state anti discrimination laws to serve as the primary enforcement mechanism of the enumerated rights, *see id.* §§ 626(d)(2), 633(b).

Indeed, the ADEA, like Title VII, provides that, in states with anti-discrimination laws that prohibit the conduct the complainant alleges, the state administrative agency has exclusive jurisdiction over a charge of discrimination for the first sixty days after the charge is filed. *See id.* § 633(b); *see also Oscar Mayer & Co.*, 441 U.S. at

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Fifth, preempts [California's Fair Employment and Housing Act] to the extent that it conflicts, but it does not to the extent that it does not." *Id.* at 540.

755 (stating that § 14(b) of the ADEA, 29 U.S.C. § 633(b), was "patterned after and is virtually in *haec verba* with § 706(c) of Title VII," 42 U.S.C. § 2000e-5(c)). Congress intended for these provisions "to screen from the federal courts those problems of civil rights that could be settled to the satisfaction of the grievant in 'a voluntary and localized manner.'" *Id.* (quoting 110 Cong. Rec. 12725 (1964) (remarks of Sen. Humphrey)). They were "intended to give state agencies a limited opportunity to resolve problems of employment discrimination and thereby to make unnecessary, resort to federal relief by victims of the discrimination." *Id.*

Here, Kroske brought her suit under the WLAD, which, pursuant to the State's police powers,

> declares that practices of discrimination against any of [Washington's] inhabitants because of race, creed, color, national origin, families with children, sex, marital status, *age*, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.

Wash. Rev. Code § 49.60.010 (emphasis added). It further creates the Washington Human Rights Commission, a designated Fair Employment Practices ("FEP") agency under 29 C.F.R. § 1601.74, and grants the agency general jurisdiction and necessary "powers with respect to elimination and prevention of discrimination." Wash. Rev. Code. § 49.60.010.

Specifically, as discussed, Kroske alleges that the Bank terminated her in violation of the WLAD, *id.*

§ 49.60.180(2), which provides that it is an unfair practice for any employer "[t]o discharge or bar any person from employment because of age."[7] This provision is consistent with the substantive provisions of the ADEA and plays an integral role in the enforcement of the federal anti-discrimination scheme. *See Oscar Mayer & Co.*, 441 U.S. at 756. The nature of the collaborative anti-discrimination scheme and the WLAD's function in it supports our conclusion that Kroske's age discrimination claim, which is substantively the same as a claim of age discrimination under the ADEA, is not preempted by the Bank's power to dismiss officers "at pleasure" under § 24(Fifth).

We are mindful, however, of Congress's intent to create a national banking system with "uniform and universal operation through the entire territorial limits of the country." *Talbott v. Bd. of Comm'rs*, 139 U.S. 438, 443 (1891). We therefore recognize that state law prohibitions against discriminatory termination that are not consistent with federal anti-discrimination laws may frustrate the congressional purpose of uniform regulation reflected in

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[7] Wash. Rev. Code § 49.44.090 further provides, in relevant part:

> It shall be an unfair practice (1) For an employer or licensing agency, because an individual is forty years of age or older, to refuse to hire or employ or license or to bar or to terminate from employment such individual, or to discriminate against such individual in promotion, compensation or in terms, conditions or privileges of employment: PROVIDED, That employers or licensing agencies may establish reasonable minimum and/or maximum age limits with respect to candidates for positions of employment, which positions are of such a nature as to require extraordinary physical effort, endurance, condition or training, subject to the approval of the executive director of the Washington state human rights commission or the director of labor and industries through the division of industrial relations.

the National Bank Act. Nonetheless, the fact that some state law provisions prohibit termination on grounds that are more expansive than the grounds set forth in federal law does not undermine our conclusion that Kroske's age discrimination claim under the WLAD, which substantively mirrors a claim under the ADEA, is not preempted. *Cf. Shaw*, 463 U.S. at 101-06 (holding that New York's Human Rights Law is not preempted under ERISA insofar as it prohibits practices that are covered under Title VII).

In sum, we conclude that the congressional enactment of the ADEA has placed limits on the Bank's authority to dismiss officers "at pleasure" under § 24(Fifth). In light of the ADEA's prohibition against age discrimination and the integral role of state anti-discrimination laws in the federal anti-discrimination scheme, we conclude that Congress did not intend for § 24(Fifth) to preempt the WLAD employment discrimination provisions, at least insofar as they are consistent with the prohibited grounds for termination under the ADEA. Thus, Kroske's claim of age discrimination under the WLAD is not barred.

IV. Conclusion

We conclude that diversity jurisdiction is proper. We also conclude that Kroske's age discrimination claim under the WLAD is not preempted by the National Bank Act. We therefore reverse the district court's grant of summary judgment in favor of U.S. Bank Corp. and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KATHY KROSKE, an individual, Plaintiff, v. U.S. BANCORP, a foreign corporation, d/b/a U.S. BANK, Defendant.	NO. CS-02-0439-RHW **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** (Filed Jan. 29, 2004)

Before the Court is Defendant U.S. Bancorp's Motion for Summary Judgment (Ct. Rec. 19). This action was filed by Plaintiff Kathy Kroske in Spokane County Superior Court and removed by Defendant U.S. Bancorp ("Bancorp") on December 23, 2002. This Court has diversity jurisdiction over Plaintiff's claim. 28 U.S.C. § 1332. Defendant asserts that Plaintiff's Washington state claim for age discrimination is preempted by the National Bank Act.

FACTS

The Defendant, U.S. Bancorp, d/b/a U.S. Bank, is a federally chartered national banking association, which was formed in accordance with Section 21 of the National Bank Act. 12 U.S.C. § 21.

On April 20, 1993, U.S. Bank's Board of Director's elected Ms. Kroske as an U.S. Bank "Assistant Vice President." On or about August 1, 2001, as a result of acquisitions, Ms. Kroske's title was changed from "Retail

Market Manager" to "Branch Manager" of the Manito bank branch in Spokane, Washington. U.S. Bank terminated Ms. Kroske on July 17, 2002. On September 23, 2002 the U.S. Bank's Board of Directors convened in Minneapolis, Minnesota. A quorum was present. At that meeting, the Board of Directors ratified Ms. Kroske's termination.

STANDARD OF REVIEW

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). When considering a motion for summary judgment, a court may neither weigh the evidence nor assess credibility; instead, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

DISCUSSION

Defendant alleges that Plaintiff's age discrimination claim under the Washington Law Against Discrimination ("WALD [sic]") is preempted by the National Bank Act (the "Act"), which grants power to the board of directors of national banking associations

> to elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, *and other officers*, define their duties, require bonds of them and fix the penalty thereof,

> *dismiss such officers of any of them at pleasure,* and appoint others to fill their places.

12 U.S.C. § 24 (Fifth) (emphasis added). Plaintiff raises three arguments in opposition to Defendant's summary judgment motion. First, she asserts that as an assistant vice-president and branch manager for U.S. Bank she was not an "officer" as contemplated by the National Bank Act. Second, Plaintiff argues that the National Bank Act and the WLAD do not conflict and, therefore, the WLAD is not preempted. Finally, she argues that even if the Act originally preempted the WLAD, the National Bank Act was impliedly amended by Title VII of the Civil Rights Act of 1964 ("Title VII") and the Age Discrimination in Employment Act of 1967 ("ADEA"), which bestowed only a qualified immunity on the boards of national banking associations to exercise their power to dismiss officers at pleasure.

A. Is Ms. Kroske an Officer as Contemplated by the National Bank Act?

Ms. Kroske claims that the National Bank Act does not apply to her claim under the WLAD because she is not an "officer" as contemplated by the National Bank Act, 12 U.S.C. § 24 (Fifth). The Defendant argues that Plaintiff's position of branch manager and Assistant Vice President were akin to the "other officers" referred to by the Act.

While the Ninth Circuit has not directly interpreted the meaning of the phrase "other officers" in the National Bank Act, in *Mackey v. Pioneer Nat'l Bank,* the court held that an "Executive Vice President" is an "officer as described by the National Bank Act" because (1) the position of vice president is specifically listed by the Act; (2) the

plaintiff was indirectly hired by the bank's board of directors through delegated authority; and (3) the plaintiff's termination was ratified in a timely manner by the bank's board of directors. 867 F.2d 520, 525 (9th Cir. 1989), citing *Mahoney v. Crocker Na'l* [sic] *Bank,* 471 F. Supp. 287, 290-91 (N.D. Cal. 1983).[1] The panel in *Mackey* next examined the purpose of the dismissal at pleasure provision of the Act and held that the "purpose ... was to give those institutions the greatest latitude possible to hire and fire their *chief operating officers,* in order to maintain the public trust." 867 F.2d at 526 (emphasis added). Based upon this overarching purpose, to qualify as "other officers" for the purposes of the Act, bank employees must have managerial roles and be involved in the operation of a bank at a high level. Moreover, the holding of *Mackey* suggests that such officers must have some impact upon the public image of the bank.

Other courts, interpreting the phrase "other officers," have looked to the National Bank Act's statutory language, legislative history and purpose for guidance. In *Alegria v. Idaho First Nat'l Bank,* the Idaho Supreme Court held that an assistant branch manager, who was responsible for "day-to-day operations" of a branch and had "full managerial duties" upon the absence of a branch manager was an "other officer" under the Act. 723 P.2d 858, 859-60 (1986).

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[1] In *Mahoney v. Crocker Nat'l Bank,* cited by the Ninth Circuit in *Mackey,* a district court in the Northern District of California did not reach the question of whether the Plaintiffs, an "Assistant Manager" and "Assistant Vice President and Manager" were "other officers." 571 F. Supp. at 290-91 (holding, however, that the bank could not employ the defense of the National Bank Act because it did not comply with its requirements for dismissing officers).

The Idaho Supreme Court reasoned that the National Bank Act represented a "Congressional mandate to establish an independent national system in order to maintain the stability of, and promote the welfare of, national banks;" thus, the court held that the term officers applied to all "active officers, to whose integrity and discretion the monies and property of the bank and its customers are entrusted, [who] should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them." *Id.*, citing *Westervelt v. Mohrenstecher*, 76 F. 118 (8th Cir. 1896) (additional citations omitted).

Similarly, in *Wells Fargo Bank v. Superior Court*, the California Supreme Court, in a well-reasoned opinion, held that the plaintiffs, who were appointed as assistant vice presidents and served as branch managers, qualified as "other officers" under the Act. 811 P.2d 1025 (Cal. 1991). The court laid out a four part test, based upon the statutory language, history and purpose of the Act, for determining whether a banking employee met the definition of an officer:

> *First*, he or she holds an office created by the board of directors and listed in the bank's bylaws. *Second*, he or she is appointed by the board of directors, either directly or pursuant to a delegation of board authority set forth in the bylaws. *Third*, he or she has the express legal authority to bind the bank in its transactions with borrowers, depositors, customers, or other third parties by executing contracts or other legal instruments on the bank's behalf. *Fourth*, his or her decision-making authority, however it might be limited by bank rule or policy, relates to fundamental banking operations in such a manner as to affect

> potentially the public trust in the banking institution.

Id. at 1031 (citations omitted).

Under the test annunciated in *Mackey*, the Plaintiff Kroske qualifies as an "other officer" under the National Bank Act. 867 F.2d at 525-26. Plaintiff was directly hired by the board of directors and her termination was ratified by the board. As a manager of the Manito branch of U.S. Bank, Plaintiff held a managerial position and was responsible for many bank operations. Moreover, as the head of a branch, Plaintiff constituted a key part of the Defendant's public image. Under the four-step test articulated in *Wells Fargo Bank*, the Plaintiff also would qualify as an other officer under the Act. Plaintiff's office was created by the board of directors, she was directly appointed by the board of directors, she does not dispute that she had the express legal authority to bind the bank, and as branch manager, she had decision making authority that related to fundamental banking operations; finally, her termination was ratified in a timely manner by the Board of Directors. Accordingly, the Court holds that the Plaintiff is an "other officer" under the National Bank Act, 12 U.S.C. § 24 (Fifth).

B. Does the National Bank Act Preempt the Washington Law Against Discrimination?

The Defendant argues that it is entitled to Summary Judgment on the Plaintiff's WLAD claim because that claim is preempted by the National Bank Act, 12 U.S.C. § 24 (Fifth), which states that officers may be dismissed by the board of directors "at pleasure." State law is preempted when "Congress evidences an intent to occupy a

given field" and when "it actually conflicts with federal law." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (citations omitted). The burden of proving preemption is upon the party claiming it as a defense. *Id.* at 255. Courts are "generally reluctant to infer preemption." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978).

The question of whether a state employment discrimination act is preempted by the National Bank Act is one of first impression in the Ninth Circuit. In *Mackey v. Pioneer Nat'l Bank*, the Ninth Circuit addressed a closely-related question and found that tort and contract claims arising out of the employment relationship between a national banking association and its officers are completely preempted. 867 F.2d at 526. Implicit in the reasoning of the court's decision in *Mackey* was the notion that the National Bank Act was enacted to subject national banking associations to a uniform employment law. The court explained that "it would make little sense to allow state tort claims to proceed, where a former bank officer's contract claims are barred .... [t]he effect would be to substitute tort for contract claims, thus subjecting the national bank to all the dangers attendant to dismissing an officer." *Id.* This rationale of uniformity also would apply to preempt state statutory discrimination claims, since those claims are little more than codified tort actions and would interfere with the national scheme of regulation.

The Supreme Court's holding that the usury provisions of the National Bank Act were intended to create a uniform and exclusive national law of regulation of national banking associations supports the notion that the "at pleasure" language was designed to subject national

banking associations to a uniform scheme of federal law. In *Beneficial Nat'l Bank v. Anderson,* after noting the "special nature of federally chartered banks," the Court opined that the National Bank Act was enacted to create "[u]niform rules limiting the liability of national banks and prescrib[e] exclusive [federal] remedies" in lieu of "possible unfriendly State legislation." 123 S. Ct. 2058, 2064 (June 2, 2003) (holding that usury provisions of National Bank Act, 12 U.S.C. §§ 85-86, preempted the field and, thus, Alabama usury legislation was void) (citations omitted). The Court explained that it was this same "federal interest that protected national banks from the state taxation that Chief Justice Marshall characterised [sic] as the 'power to destroy.'" *Id.,* citing *McCulloch v. Maryland,* 4 Wheat. 316, 431, 4 L.Ed. 579 (1819).

Ninth Circuit decisions regarding analogous banking laws also support a finding of field preemption. While the Ninth Circuit has not addressed the question of state discrimination actions directly, it has found that both the Federal Home Loan Bank Act and the Federal Reserve Act, which contain "at pleasure" language identical to that found in 12 U.S.C. § 24 (Fifth), preempt all wrongful discharge claims based upon state law. In *Walleri v. Federal Home Loan Bank of Seattle,* the court found that the "at pleasure" language of 12 U.S.C. § 1432(a) of the Federal Home Loan Bank Act preempts the field and, therefore, preempts all wrongful discharge claims under state law. 83 F.3d 1575 (9th Cir. 1996). In *Bollow v. Federal Reserve Bank,* the Ninth Circuit found that the same "at pleasure" language in the Federal Reserve Act, 12 U.S.C. § 341 (Fifth), preempted state claims of wrongful discharge based upon denial of state due process rights. 650 F.2d 1093, 1098 (9th Cir. 1981).

Based upon this finding of field preemption, the Ninth Circuit has more strictly construed the National Bank Act than the majority of courts, which have held that the National Bank Act does not preempt state claims when the grounds for termination violate public policy. *See, i.e., Booth v. Old Nat'l Bank,* 900 F. Supp. 836, 843 (N.D.W.V. 1995); *Sargent v. Central Nat'l Bank & Trust,* 809 P.2d 1298 (Okl. 1991) (holding cause of action was not preempted for retaliatory discharge for refusing to destroy or alter audit reports); *Schey v. Trans Pac. Nat'l Bancorp,* 266 Cal. Rptr. 39 (Cal. 1990) (holding cause of action not preempted for retaliatory discharge for reporting regulatory violations). Indeed, the Ninth Circuit has held that a claim of wrongful discharge is preempted by the Federal Home Loan Bank Act, even when the grounds for termination contravene public policy. *Inglis v. Feinerman,* 701 F.2d 97, 99 (9th Cir. 1983) (officer discharged after insisting that bank conform practices to federal law). Defendant notes that if Congress had intended to carve an exception to its regulation of national banking associations when the grounds for termination violate public policy, it could have amended the Act to overcome the above interpretation. Unfortunately, during its many amendments of the Act, Congress has declined to provide such an exception.

Because the Ninth Circuit already has held that common law tort and contract claims are preempted by the National Bank Act, because the Supreme Court has held that the National Bank Act is designed to create a uniform system of legislation, and because the "at pleasure" language in the Federal Home Loan Bank Act and Federal Reserve Act, which is identical to that in the National Bank Act, has been interpreted to preempt all state

wrongful discharge claims, the Court holds that Plaintiff's claims under the WLAD are preempted.[2]

C. Was the National Bank Act Impliedly Amended by the ADEA and Title VII?

Plaintiff argues that even if the National Bank Act did originally preempt the WLAD, it has been impliedly amended by the ADEA and Title VII in such a way that it no longer preempts consistent state law. In *Mueller v. First Nat'l Bank of the Quad Cities,* a district court held that the National Bank Act did not preempt federal claims brought under the ADEA or Title VII. 797 F. Supp. 656 (C.D. Ill. 1992). The Defendant argues that while *Mueller* may very well be a valid interpretation of ADEA and Title VII, Supreme Court precedent dictates that state anti-discrimination law that is not preempted by ADEA or Title VII, still may be preempted by another federal statute. In *Shaw v. Delta Airlines Inc.,* the Supreme Court found that although "state laws play a significant role in the enforcement of Title VII" state law still could be preempted by ERISA. 463 U.S. 86, 101-02 (1983). Therefore, the Supreme Court found that ERISA preempted New York's Human Rights Law to the extent it conflicted with ERISA. *Id.*[3] In the present ease, the Court is faced with a similar

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[2] The Plaintiff asserts that the age discrimination provisions of the WLAD do not conflict with the "at pleasure" language of the National Bank Act. This opinion however rests upon field, not conflict preemption.

[3] The Plaintiff, relying on a non-majority opinion in *Peatros v. Bank of America,* asserts that since federal claims under Title VII and ADEA are not preempted by the National Bank Act, state employment discrimination claims must survive. 990 P.2d 539 (Cal. 2000) (no majority opinion). In *Peatros,* however, the majority of justices (the

(Continued on following page)

dilemma. Even assuming that Title VII and ADEA are not preempted by the National Bank Act, those federal remedies cannot open the window to state legislation. To append consistent state regulation to Title VII and ADEA would upend the National Bank Act's uniform scheme of federal legislation and subject national banking associations to the vagaries of over 50 unique employment approaches.

Therefore, the Court holds that regardless of whether a cause of action would be available to Plaintiff under federal anti-discrimination law, Title VII and ADEA cannot save her state law anti-discrimination claim from preemption under the National Bank Act. For this reason, the Court grants the Defendant's motion for summary judgment.

Accordingly, **IT IS HEREBY ORDERED**, that:

1. Defendant U.S. Bancorp's Motion for Summary Judgment (Ct. Rec. 19) is **GRANTED**.

2. The above-captioned case is **DISMISSED** with prejudice.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order, to furnish copies to counsel and to **close** the file.

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main opinion and the concurring opinion) rejected the notion that the National Bank Act was impliedly amended by Title VII and ADEA, as to open the window for state anti-discrimination laws. The main opinion (four justices) in *Peatros*, held that because Title VII and ADEA did not contain "a clear expression" of intent to "append analogous state laws to the national scheme" national banking associations should not be exposed to "liability for dismissing officers in violation of state laws. . . ." *Id.* at 186-89.

DATED this 29 day of January 2004.

/s/ Robert H. Whaley
ROBERT H. WHALEY
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KATHY KROSKE, an individual, Plaintiff, v. U.S. BANCORP, a foreign corporation d/b/a U.S. BANK, Defendant.	NO. CS-02-0439-RHW **ORDER DETERMINING AMOUNT IN CONTROVERSY MET FOR JURISDICTIONAL PURPOSES** (Filed Jun. 02, 2003)

In the prior status conference held in this matter on April 24, 2003, the parties had not identified the amount in controversy in the case and, therefore, it was unclear whether the Court had jurisdiction. If diversity jurisdiction did not exist, then removal would have been improper. At the status conference, the Court raised the jurisdictional issue *sua sponte*, and asked the parties to brief the issue. Having now reviewed the parties' submissions, and having heard oral argument at a hearing held on May 28, 2003, the Court now finds that the amount in controversy exceeds the $75,000 threshold

DISCUSSION

Where a plaintiff's complaint does not specify the amount of damages being sought, the removing defendant bears the burden of demonstrating by a preponderance of the evidence that the amount in controversy requirement is satisfied. *See Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 376 (9th Cir.1997); *Gaus v. Miles, Inc.*, 980 F.2d 564, 567 (9th Cir.1992). This burden can easily be met if it is

facially apparent from the allegations in the complaint that plaintiff's claims exceed $75,000. *See Kenneth Rothschild Trust v. Morgan Stanley*, 199 F. Supp. 2d 993, 1001 (C.D. Cal. 2002). If the amount in controversy is not clear on the face of the complaint, however, defendant must do more than point to a state law that might allow recovery above the jurisdictional minimum. Rather, the "defendant must submit 'summary-judgment-type evidence' to establish that the actual amount in controversy exceeds $75,000." *Singer*, 116 F.3d at 377. If defendant presents such proof, it then becomes plaintiff's burden to show, as a matter of law, that it is certain he will not recover the jurisdictional amount. *See De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1411 (5th Cir.1995). In measuring the amount in controversy, a court must "'assum[e] that the allegations of the complaint are true and assum[e that] a jury [will] return[ ] a verdict for the plaintiff on all claims made in the complaint.'" *Kenneth Rothschild Trust*, 199 F. Supp. 2d. at 1001 (quoting *Jackson v. American Bankers Ins. Co. of Florida*, 976 F.Supp. 1450, 1454 (S.D. Ala.1997)).

In response to Defendant's interrogatories, Plaintiff identified the following categories of damages: "Lost wages, benefits including but not limited to health and dental insurance, 401(k) contributions, value of life insurance policies, stock options," emotional distress, and attorney's fees. Defendant maintains that Plaintiff's lost wages equal $45,000 and continue to grow in the amount of $5,000 per month because she has not found substitute employment.[1] In her answers to interrogatories, Plaintiff states that, indeed, her claim continues to grow at a rate of $5,000 per month since she has not been able to find

[1] Plaintiff's salary was $60,000 at the time she was fired.

substitute employment. Thus, Defendant argues that at the time of the status conference, Plaintiff's claim currently stands at $55,000, and is continuing to grow.[2]

Defendant claims that Plaintiff's 401(k) contribution equals between $1650 to $2200. This amount, too, continues to grow each month. Plaintiff claims the proper amount for the 401(k) contribution is closer to $1000.

Defendant notes that Plaintiff seeks emotional distress damages, but has failed to provide a dollar figure for the amount she seeks. The Court may make an independent appraisal of the amount, particularly where the Plaintiff has proven silent as to the amount she seeks. *See Bosinger v. Phillips Plastics, Corp.*, 57 F. Supp. 2d. 986, 989 (S.D. Cal. 1999). Defendant points to evidence of emotional distress damages awarded in age discrimination cases in Washington (citing to the Northwest Personal Injury Litigation Reports). The range for requested emotional distress damages in these cases ranged from

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[2] Plaintiff claims that the amount of lost wages is only that which existed at the time the case was removed. Plaintiff claims that amount was only $30,000. The case law cited by Plaintiff in support of its position does not appear to limit a determination of damages as they stand at the time of removal but, rather, simply states that the court should evaluate the *claims* as they stand at the time of removal. *See Kenneth Rothschild Trust v. Morgan Stanley*, 199 F.3d 993, 1001 (C.D. Cal. 2002). Thus, it appears that Defendant's assessment of lost wages damages is appropriate. *Cf. Cohn v. Petsmart, Inc.*, 281 F.3d 837 (9th Cir. 2002) (estimate of damages at time of removal sufficient to establish amount-in-controversy for jurisdictional purposes); *Angus v. Shiley, Inc.*, 989 F.2d 142, 146 (3d Cir. 1993) ("the amount in controversy is not measured by the low end of an open-ended claim, but rather by reasonable reading of the value of the rights being litigated."). This is particularly true, given that Plaintiff herself claims that she is entitled to $5000 more for each month that passes in which she is unable to find employment.

$25,000 to $200,000. The Court may rely on such evidence in determining the potential damages in the case. *See, e.g., Surbe v. Reliance Nat. Indem. Co.*, 110 F. Supp. 2d 1227, 1232 (N.D. Cal. 2000) (court looked at evidence of jury verdicts to determine amount of punitive damages potentially at issue in the case where plaintiff offered no evidence as to damages sought). Thus, it seems at a minimum, the Court can presume that Plaintiff's emotional distress claim will add an additional $25,000 to the amount in controversy.

Lastly, the Court can consider attorneys fees when determining the amount in controversy for jurisdictional purposes. Where an underlying statute authorizes an award of attorney's fees, those fees are considered for amount in controversy purposes. *See Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156, (9th Cir. 1998). Both Defendant and Plaintiff agree that this rule applies here, as the Washington Law Against Discrimination provides for attorney's fees. Plaintiff argues that Defendant has failed to establish, by a preponderance of the evidence, that the fees are large enough to satisfy the amount in controversy requirement. Defendant acknowledges that it is difficult to estimate the amount of fees that will accrue in the case, but points to two Washington cases in which an award of attorneys fees under the WLAD exceeded $40,000.

In light of the foregoing, it appears that Plaintiff's claims easily exceed $75,000, considering that her lost wages claim currently stands at $55,000, and that a conservative estimate of the damages she may attain for emotional distress stands at $25,000. This total equals $80,000, and does not take into account the attorney's fees

she may recover and damages for other benefits, which push that total higher.

Accordingly, **IT IS HEREBY ORDERED** that removal was proper in this case, as the amount-in-controversy exceeds $75,000.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order, and to furnish copies to

DATED this 2 day of ~~May~~ June, 2003.

/s/ Robert H. Whaley
ROBERT H. WHALEY
United States District Judge

APPENDIX E

The Ninth Circuit's order denying rehearing and rehearing en banc was attached by the court of appeals to the amended opinion and is reprinted *supra* at App. 1a-2a.

APPENDIX F

The National Bank Act provides at 12 U.S.C. § 24 in relevant part as follows:

Section 24. Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power –

* * *

Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

The Age Discrimination in Employment Act of 1967 provides in relevant part as follows:

29 U.S.C. § 621 provides:

Section 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that –

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 633 provides:

Section 633. Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated:

Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

The Washington Labor Regulations provide in relevant part as follows:

§ 49.44.090

Unfair practices in employment because of age of employee or applicant – Exceptions.

It shall be an unfair practice:

(1) For an employer or licensing agency, because an individual is forty years of age or older, to refuse to hire or employ or license or to bar or to terminate from employment such individual, or to discriminate against such individual in promotion, compensation or in terms, conditions or privileges of employment: PROVIDED, That employers or licensing agencies may establish reasonable minimum and/or maximum age limits with respect to candidates for positions of employment, which positions are of such a nature as to require extraordinary physical effort, endurance, condition or training, subject to the approval of the executive director of the Washington state human rights commission or the director of labor and industries through the division of industrial relations.

(2) For any employer, licensing agency or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses any limitation, specification or discrimination respecting individuals forty years of age or older: PROVIDED, That nothing herein shall forbid a requirement of disclosure of birth date upon any form of application for employment or by the production of a birth

certificate or other sufficient evidence of the applicant's true age after an employee is hired.

Nothing contained in this section or in RCW 49.60.180 as to age shall be construed to prevent the termination of the employment of any person who is physically unable to perform his or her duties or to affect the retirement policy or system of any employer where such policy or system is not merely a subterfuge to evade the purposes of this section; nor shall anything in this section or in RCW 49.60.180 be deemed to preclude the varying of insurance coverages according to an employee's age; nor shall this section be construed as applying to any state, county, or city law enforcement agencies, or as superseding any law fixing or authorizing the establishment of reasonable minimum or maximum age limits with respect to candidates for certain positions in public employment which are of such a nature as to require extraordinary physical effort, or which for other reasons warrant consideration of age factors.

The Washington Law Against Discrimination provides at Wash. Rev. Code § 49.60.010 *et seq.* in relevant part as follows:

§ 49.60.010 provides:

Purpose of chapter.

This chapter shall be known as the "law against discrimination". It is an exercise of the police power of the state for the protection of the public welfare, health, and peace of the people of this state, and in fulfillment of the provisions of the Constitution of this state concerning civil rights. The legislature hereby finds and declares that practices of discrimination against any of its inhabitants because of race, creed, color, national origin, families with children, sex, marital status, age, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person are a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state. A state agency is herein created with powers with respect to elimination and prevention of discrimination in employment, in credit and insurance transactions, in places of public resort, accommodation, or amusement, and in real property transactions because of race, creed, color, national origin, families with children, sex, marital status, age, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person; and the commission established hereunder is hereby given general jurisdiction and power for such purposes.

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§ 49.60.120 provides in relevant part:

Certain powers and duties of commission.

The commission shall have the functions, powers and duties:

* * *

(4) To receive, impartially investigate, and pass upon complaints alleging unfair practices as defined in this chapter.

* * *

(7) To cooperate and act jointly or by division of labor with the United States or other states, with other Washington state agencies, commissions, and other government entities, and with political subdivisions of the state of Washington and their respective human rights agencies to carry out the purposes of this chapter. However, the powers which may be exercised by the commission under this subsection permit investigations and complaint dispositions only if the investigations are designed to reveal, or the complaint deals only with, allegations which, if proven, would constitute unfair practices under this chapter. The commission may perform such services for these agencies and be reimbursed therefor.

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§ 49.60.180 provides in relevant part:

Unfair practices of employers.

It is an unfair practice for any employer:

(1) To refuse to hire any person because of age * * *, unless based upon a bona fide occupational qualification * * *.

(2) To discharge or bar any person from employment because of age * * *.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age * * *.

(4) To print, or circulate, or cause to be printed or circulated any statement, advertisement, or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses any limitation, specification, or discrimination as to age * * *, unless based upon a bona fide occupational qualification * * *.

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§ 49.60.230 provides in relevant part:

Complaint may be filed with commission.

(1) Who may file a complaint:

(a) Any person claiming to be aggrieved by an alleged unfair practice may, personally or by his or her attorney, make, sign, and file with the commission a complaint in writing under oath or by declaration. The complaint shall state the name of the person alleged to

have committed the unfair practice and the particulars thereof, and contain such other information as may be required by the commission.

(b) Whenever it has reason to believe that any person has been engaged or is engaging in an unfair practice, the commission may issue a complaint.

(c) Any employer or principal whose employees, or agents, or any of them, refuse or threaten to refuse to comply with the provisions of this chapter may file with the commission a written complaint under oath or by declaration asking for assistance by conciliation or other remedial action.

(2) Any complaint filed pursuant to this section must be so filed within six months after the alleged act of discrimination * * *.

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§ 49.60.240 provides in relevant part:

Complaint investigated – Conference, conciliation – Agreement, findings – Rules.

After the filing of any complaint, the chairperson of the commission shall refer it to the appropriate section of the commission's staff for prompt investigation and ascertainment of the facts alleged in the complaint. The investigation shall be limited to the alleged facts contained in the complaint. The results of the investigation shall be reduced to written findings of fact, and a finding shall be made that there is or that there is not reasonable cause for believing that an unfair practice has been or is being committed. A copy of said findings shall be provided to the

complainant and to the person named in such complaint, hereinafter referred to as the respondent.

If the finding is made that there is reasonable cause for believing that an unfair practice has been or is being committed, the commission's staff shall immediately endeavor to eliminate the unfair practice by conference, conciliation, and persuasion.

If an agreement is reached for the elimination of such unfair practice as a result of such conference, conciliation, and persuasion, the agreement shall be reduced to writing and signed by the respondent, and an order shall be entered by the commission setting forth the terms of said agreement. No order shall be entered by the commission at this stage of the proceedings except upon such written agreement, * * *, the commission staff shall, to the extent feasible, engage in conciliation with respect to such complaint. Any conciliation agreement arising out of conciliation efforts by the commission shall be an agreement between the respondent and the complainant and shall be subject to the approval of the commission. Each conciliation agreement shall be made public unless the complainant and respondent otherwise agree and the commission determines that disclosure is not required to further the purposes of this chapter.

If no such agreement can be reached, a finding to that effect shall be made and reduced to writing, with a copy thereof provided to the complainant and the respondent.

* * *

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§ 49.60.250 provides:

Hearing of complaint by administrative law judge – Limitation of relief – Penalties – Order.

(1) In case of failure to reach an agreement for the elimination of such unfair practice, and upon the entry of findings to that effect, the entire file, including the complaint and any and all findings made, shall be certified to the chairperson of the commission. The chairperson of the commission shall thereupon request the appointment of an administrative law judge under Title 34 RCW to hear the complaint and shall cause to be issued and served in the name of the commission a written notice, together with a copy of the complaint, as the same may have been amended, requiring the respondent to answer the charges of the complaint at a hearing before the administrative law judge, at a time and place to be specified in such notice.

(2) The place of any such hearing may be the office of the commission or another place designated by it. The case in support of the complaint shall be presented at the hearing by counsel for the commission: PROVIDED, That the complainant may retain independent counsel and submit testimony and be fully heard. No member or employee of the commission who previously made the investigation or caused the notice to be issued shall participate in the hearing except as a witness, nor shall the member or employee participate in the deliberations of the administrative law judge in such case. Any endeavors or negotiations for conciliation shall not be received in evidence.

(3) The respondent shall file a written answer to the complaint and appear at the hearing in person or otherwise, with or without counsel, and submit testimony and be fully heard. The respondent has the right to cross-examine the complainant.

(4) The administrative law judge conducting any hearing may permit reasonable amendment to any complaint or answer. Testimony taken at the hearing shall be under oath and recorded.

(5) If, upon all the evidence, the administrative law judge finds that the respondent has engaged in any unfair practice, the administrative law judge shall state findings of fact and shall issue and file with the commission and cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair practice and to take such affirmative action, including, (but not limited to) hiring, reinstatement or upgrading of employees, with or without back pay, an admission or restoration to full membership rights in any respondent organization, or to take such other action as, in the judgment of the administrative law judge, will effectuate the purposes of this chapter, including action that could be ordered by a court, except that damages for humiliation and mental suffering shall not exceed ten thousand dollars, and including a requirement for report of the matter on compliance. Relief available for violations of RCW 49.60.222 through 49.60.224 shall be limited to the relief specified in RCW 49.60.225.

(6) If a determination is made that retaliatory action, as defined in RCW 42.40.050, has been taken against a whistleblower, as defined in RCW 42.40.020, the administrative law judge may, in addition to any other

remedy, impose a civil penalty upon the retaliator of up to three thousand dollars and issue an order to the state employer to suspend the retaliator for up to thirty days without pay. At a minimum, the administrative law judge shall require that a letter of reprimand be placed in the retaliator's personnel file. All penalties recovered shall be paid into the state treasury and credited to the general fund.

(7) The final order of the administrative law judge shall include a notice to the parties of the right to obtain judicial review of the order by appeal in accordance with the provisions of RCW 34.05.510 through 34.05.598, and that such appeal must be served and filed within thirty days after the service of the order on the parties.

(8) If, upon all the evidence, the administrative law judge finds that the respondent has not engaged in any alleged unfair practice, the administrative law judge shall state findings of fact and shall similarly issue and file an order dismissing the complaint.

(9) An order dismissing a complaint may include an award of reasonable attorneys' fees in favor of the respondent if the administrative law judge concludes that the complaint was frivolous, unreasonable, or groundless.

(10) The commission shall establish rules of practice to govern, expedite, and effectuate the foregoing procedure.

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(3)

Supreme Court, U.S.
FILED
JUL 28 2006
OFFICE OF THE CLERK

NO. 05-1607

IN THE
Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION,
Petitioner,

v.

KATHY KROSKE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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July 2006

QUESTION PRESENTED

Whether the National Bank Act—which allows national banks to dismiss bank officers "at pleasure" and which petitioner concedes does not preclude claims brought under the federal Age Discrimination in Employment Act (ADEA)—preempts an age discrimination claim brought under a Washington State statute that substantively mirrors the ADEA.

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STATEMENT OF THE CASE

Congress enacted the National Bank Act in 1864. To preserve public trust in the highest ranking officials of national banks, Congress included in the Act a provision that allows the banks to dismiss its officers "at pleasure." *See* 12 U.S.C. § 24 (Fifth). The parties agree that the Act does not authorize national banks to dismiss its officers in violation of the federal Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq*. The issue in this case is whether the National Bank Act authorizes national banks to violate state anti-discrimination laws that substantively mirror the ADEA and are an integral part of the enforcement mechanisms created by the ADEA.

Respondent Kathy Kroske worked for petitioner U.S. Bank National Association for 25 years. Pet. App. 3a. She began as a teller in 1977 and was later promoted to retail market manager. The year before her termination, the bank restructured, and, as a result, Ms. Kroske's job title was changed to branch manager. *Id.*; Def's Statement of Material Facts ¶ 8. At age 51, Ms. Kroske was significantly older than any of the other branch managers in her market area, all of whom were in their twenties or thirties. Compl. ¶ 3.5; Pet. App. 4a.

Shortly after becoming branch manager, Ms. Kroske's supervisor notified her that she was not meeting the goals he had set for her branch. He threatened her with probation or termination if she did not meet her goal by week six of her next campaign to increase business. Compl. ¶ 3.10. Even though Ms. Kroske's branch was short-staffed, the supervisor increased its goal by 62% over the previous campaign while drastically decreasing the goals for the other branches in the market area. *Id.* ¶ 3.13. During the campaign, two key employees left the branch, and despite numerous requests to her supervisor for assistance, none was provided. Moreover, the departed employees were not quickly replaced, and the bank's goal was

not reduced. *Id.* ¶¶ 3.14-3.17. Even so, Ms. Kroske's branch had achieved 91% of its goal by the week-six deadline. *Id.* ¶ 3.18. By the campaign's end, Ms. Kroske's branch had exceeded by nearly 20% the goal imposed by the bank. *Id.* Nevertheless, Ms. Kroske was fired. Pet. App. 3a-4a. She was replaced by a man in his twenties with less experience. *Id.* at 4a; Compl. ¶ 3.19.

Ms. Kroske brought this action in Washington State Superior Court. She alleged that the bank terminated her because of her age in violation of the Washington Law Against Discrimination (WLAD). She sought damages, attorney's fees, and costs. The Bank removed the case to federal court and moved for summary judgment, arguing that 12 U.S.C. § 24 (Fifth)—the National Bank Act's dismiss-at-pleasure provision—preempts Ms. Kroske's claim under the WLAD. The district court granted the motion. Pet. App. 60a.

The Ninth Circuit reversed and remanded the case to the district court for further proceedings. Pet. App. 2a. The court concluded that the at-pleasure provision, as impliedly amended by the ADEA, does not preempt the WLAD. In so holding, it relied, among other things, on the fact that, under the ADEA, state anti-discrimination statutes "pla[y] an integral role in the enforcement of the federal anti-discrimination scheme" and that the WLAD "substantively mirrors" the ADEA. *Id.* at 23a, 24a. Thus, the court concluded, absent any explicit or implicit congressional intent to the contrary, the at-pleasure provision of the National Bank Act does not preempt an anti-discrimination statute enacted under Washington State's historic police powers. Pet. App. 22a-25a.

REASONS FOR DENYING THE WRIT

A. No Conflict Exists Among The Federal Courts Of Appeals Or With A Decision Of The California Supreme Court.

Petitioner premises its claim for certiorari on supposed conflicts with the Sixth Circuit and the California Supreme Court. Pet. i, 2-3, 10-14. Both conflicts are illusory. Accordingly, review should be denied.

1. There Is No Meaningful Split With The Sixth Circuit.

In a 1987 per curiam decision, the Sixth Circuit held that the at-pleasure provision of the Federal Reserve Act—*not* the National Bank Act at issue here—preempts a state-law statutory anti-discrimination claim. *See Ana Leon T. v. Federal Reserve Bank of Chicago,* 823 F.2d 928 (6th Cir. 1987), *cert. denied,* 484 U.S. 1086 (1987). *Leon* does not support review in this case for three independent reasons.

a. Even assuming that a claim of preemption by the Federal Reserve Act is identical to a claim of preemption by the National Bank Act, *but see infra* at 7-10, in the many decades since state legislatures began enacting employment discrimination legislation, only two federal courts of appeals—the Sixth Circuit in its 1987 *Leon* decision and the Ninth Circuit in the decision below—have addressed the question whether a federal at-pleasure provision preempts a state-law statutory employment discrimination claim. Thus, at most, the petition presents a shallow circuit split that cries out for further percolation before this Court enters the fray.

The need for additional consideration by the lower appellate courts is underscored by the Sixth Circuit's failure in *Leon* to provide any explanation or analysis. The court focused almost entirely on the plaintiff's federal employment discrimination

and civil rights claims, 823 F.2d at 929-32, and, in one sentence, concluded without discussion that the Federal Reserve Act's at-pleasure provision "preempts any state-created employment right to the contrary." *Id.* at 931. Although the court explicitly recognized that federal employment discrimination claims are not affected by the at-pleasure provision, *see id.*, it did not confront the question whether state-law employment discrimination claims that substantively mimic federal employment discrimination claims should be treated differently from state-law claims that seek to impose liability beyond that provided by federal law.

Even petitioner recognizes that a discussion of the merits requires far more analysis than that provided by *Leon*. *See* Pet. 4-5, 15-17, 23-25. And, not surprisingly, other courts, including the court of appeals below, have commented on the Sixth Circuit's cavalier treatment of the preemption issue. *See* Pet. App. 17a (noting that the Sixth Circuit provided "little analysis" and rejecting its "summary conclusion"); *Katsiavelos v. Federal Reserve Bank of Chicago*, 1995 WL 103308, *2 (N.D. Ill. Mar. 3, 1995) (criticizing "[t]he *Leon* court [for] provid[ing] no reasons or policy for its holding"); *Moodie v. Federal Reserve Bank of New York*, 831 F. Supp. 333, 336 (S.D.N.Y. 1993) (refusing to follow *Leon* because "the Sixth Circuit's pronouncement gives no basis for its opinion and sets forth no policy reasons for its holding"); *White v. Federal Reserve Bank*, 660 N.E.2d 493, 495 (Ohio Ct. App. 1995) ("[T]he Sixth Circuit... failed to engage in any analysis or state the basis of its decision. Therefore, we decline to rely upon the holding in *Ana Leon T.*").

Given *Leon*'s extremely cursory consideration of the preemptive scope of the Federal Reserve Act's at-pleasure provision, its holding is ideally suited for en banc review in the

Sixth Circuit, not for review by this Court.[1]

b. Although *Leon*'s conclusory holding is stated very broadly, *Leon* may not, in fact, be at odds with the ruling below. The plaintiff in *Leon* originally filed an administrative charge with the Equal Employment Opportunity Commission (EEOC), claiming discrimination on the basis of national origin and disability. 823 F.2d at 929. Her *pro se* district court complaint "did not explicitly set forth the legal bases of her claims," but asserted only "that she was discharged on false grounds of chronic tardiness and that she was discriminated against." *Id.* On appeal, still proceeding *pro se*, the plaintiff claimed discrimination on the basis of national origin and race under both federal anti-discrimination law and Michigan's Elliott-Larsen Act, which prohibits an employer from discriminating on some, but not all, grounds prohibited by federal law and some grounds not covered by federal law, such as "weight, height, or marital status." *Id.* at 931. As a matter of federal law, the Sixth Circuit held that only the plaintiff's national origin claim was potentially viable and remanded for further fact finding to determine whether the claim had been timely filed. *Id.* at 931-32.

As for the plaintiff's state-law claim, the Sixth Circuit noted that the Elliott-Larsen Act does not prohibit national

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[1]In *Arrow v. Federal Reserve Bank of St. Louis*, 358 F.3d 392 (6th Cir. 2004), issued some 17 years after *Leon*, the Sixth Circuit was again presented with the question whether the Federal Reserve Act preempts a state anti-discrimination claim, and, again, it did not analyze the issue on its merits. Rather, the court noted that oral argument was not warranted and affirmed the district court's dismissal on the ground that it was bound by *Leon*. *See id.* at 393 (citing Sixth Circuit Rule 206(c) requiring adherence to panel rulings, absent en banc review, and noting that "[t]here being no principled basis on which to distinguish *Leon*, we are obliged to follow its holding."). The plaintiff in *Arrow* did not seek en banc review.

origin discrimination and that the plaintiff's race discrimination claim had been forfeited for failure to raise it below. *Id.* at 931. Beyond that, *Leon* provided *no* description of the plaintiff's state-law claim. However, it appears that the only state-law claim that the plaintiff could have possessed was one based on disability discrimination, because she had made some mention of discrimination on the basis of lower back pain in her EEOC charge. Such a state-law discrimination claim necessarily would have gone beyond the protections of federal law, which did not provide a general right of action for disability discrimination until the private employment provisions of Title I of the Americans With Disabilities Act became effective in 1992. *See* Pub. L. 101-336, § 108, 104 Stat. 337 (1990); *see also* 50 Fed. Reg. 18,769 (May 2, 1985) (federal reserve banks are private employers for purposes of federal anti-discrimination legislation). In sum, it is likely that the state-law discrimination claim in *Leon*, to the extent that it can be discerned from the Sixth Circuit's ruling, was *not* the kind of claim cognizable under federal law.

By contrast, the Washington Law Against Discrimination (WLAD), under which Ms. Kroske's claim arises, is substantively the same as the federal Age Discrimination in Employment Act (ADEA). In relevant part, the "WLAD provides that it is an unfair practice for any employer '[t]o discharge or bar any person from employment because of age.' Wash. Rev. Code § 49.60.180(2). This provision mirrors the substantive provisions of the ADEA and is interpreted consistently with the ADEA." Pet. App. 20a-21a; *see Anderson v. Pacific Maritime Ass'n*, 336 F.3d 924, 926 n.1 (9th Cir. 2003) ("Washington's Law Against Discrimination tracks federal law, and thus our analysis will cite only federal law, but applies with equal force to the Plaintiffs' claim under Washington law."). The Ninth Circuit's no-preemption ruling

below rested on the WLAD's substantive identity with federal law and suggested that a case presenting a more expansive state-law claim would have presented a different, and potentially more difficult, question:

> We therefore recognize that state law prohibitions against discriminatory termination that are not consistent with federal anti-discrimination laws may frustrate the congressional purpose of uniform regulation reflected in the National Bank Act. Nonetheless, the fact that some state law provisions prohibit termination on grounds that are more expansive than the grounds set forth in federal law does not undermine our conclusion that Kroske's age discrimination claim under the WLAD, which substantively mirrors a claim under the ADEA, is not preempted.

Pet. App. 24a.

In this regard, the decision below is not inconsistent with the result reached in *Leon*. The Sixth Circuit held that the at-pleasure provision of the Federal Reserve Act preempted a state employment discrimination statute that was likely being employed in a manner substantively inconsistent with federal anti-discrimination law. Given the complete failure of analysis in *Leon*, the Sixth Circuit probably gave no thought to the question whether state anti-discrimination laws that mirror federal law are preempted by the Federal Reserve Act. Given that reality, the Sixth Circuit will likely revisit *Leon* in an appropriate case.

c. The foregoing discussion has assumed, as have some courts, *see, e.g.*, *Arrow*, 358 F.3d at 394; Pet. App. 12a n.2, that the preemptive breadth of the at-pleasure provision of the Federal Reserve Act at issue in *Leon* is the same as that of the at-pleasure provision of the National Bank Act at issue here.

Although in our view neither act preempts state-law anti-discrimination claims, there is a serious argument that the National Bank Act's at-pleasure provision has less preemptive force than that of the Federal Reserve Act. Thus, a decision regarding the preemptive effect of one Act cannot properly be viewed as in conflict with a decision regarding the preemptive effect of the other.

The National Bank Act was enacted in the 1860's. "To interpret accurately" Congress's intent, the Court must not read statutes "as if they were written today, for to do so would inevitably distort their intended meaning." *Goldstein v. California*, 412 U.S. 546, 564 (1973). As the court of appeals below noted, one commentator has recently argued "that in light of the employment law principles that were in force at the time of the enactment of the National Bank Act, the courts have erred in concluding that the at-pleasure provisions were intended to render state contractual claims void." Pet. App. 14a n.3. Although "[w]e are accustomed to thinking of employment law in the United States as basically a regime of employment at will[,] ... this was not the back-drop against which the 'at pleasure' language was drafted and enacted in New York in 1838, or re-enacted in the National Currency and National Bank Acts of 1863 and 1864." M.B.W. Sinclair, *Employment at Pleasure: An Idea Whose Time Has Passed*, 2 U. Tol. L.Rev. 531, 540 (1992).

In fact, according to this scholar, the reality was "precisely the contrary." *Id.* "[E]mployment for an unspecified term was presumed to be annual, and dismissal within that term had to be for cause." *Id.* at 541. On the other hand, another scholar argues that, by the mid-nineteenth century, "whatever consensus [had] existed" regarding the presumptive one-year term had "dissolved." Jay Feinman, *The Development of the Employment at Will Rule*, 20 Am. J. Legal Hist. 118, 122-23 (1976) (citing

one mid-nineteenth century treatise stating that no presumption of yearly hiring existed in Connecticut, a mid-century New York Court of Appeals decision holding that the English rule of annual hiring still governed in New York, and another mid-century treatise arguing for a rebuttable presumption of yearly hiring).

The National Bank Act was passed in the midst of this confusion. Thus, seen from the perspective of a mid-nineteenth century legislator, the term "at pleasure" served only to override any common-law understanding of one-year employment and to institute what today is known as employment "at-will," not to negate statutory protections that alter employment contracts by imposing anti-discrimination obligations.

By 1913—when the Federal Reserve Act at issue in *Leon* was enacted—the background understanding had changed and employment at-will was the norm. *See* J. Peter Shapiro and James F. Tune, *Implied Contract Rights to Job Security,* 26 Stan. L. Rev. 335, 341 (1974) ("With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will.") (quoting Horace Wood, *Master and Servant* § 134 (1877)); 11 A.L.R. 469 (1921). Therefore, the Federal Reserve Act's at-pleasure provision arguably was intended to do more than clarify that Federal Reserve employees may be dismissed without cause. In our view, neither at-pleasure provision preempts any claim under a state statutory employment discrimination statute because neither was intended to accomplish that end. *See infra* Part C. However, because the preemptive scope of the at-pleasure provision of the National Bank Act may be based on different considerations than those applicable to the preemptive scope of the at-pleasure provision of the Federal Reserve Act, *Leon* and the ruling below do not present the same legal issue. The Court should await a genuine conflict in appellate authority regarding the same Act of

Congress before it grants review.[2]

2. The Alleged Conflict With The California Supreme Court Does Not Exist.

The petition also relies on an asserted conflict with a case from the California Supreme Court, *Peatros v. Bank of America*, 990 P.2d 539 (Cal. 2000). No such conflict exists. To explain why, it is necessary to describe the three opinions of the seven justices in *Peatros*.

First, as petitioner acknowledges, the three-justice lead opinion, authored by Justice Mosk, held that the National Bank Act does *not* preempt claims under state anti-discrimination statutes with substantive obligations no greater than those demanded under federal anti-discrimination law. For that reason, the Mosk opinion held that plaintiff Peatros's state-law claim could go forward.

Writing only for herself, Justice Kennard found that the plaintiff was not a bank "officer" and, thus, was not covered by the at-pleasure provision. Like the Mosk opinion, therefore, Justice Kennard's opinion concluded that the plaintiff's state-law suit could proceed. *Id.* at 557. Thus, the *decision* of the California Supreme Court was that the plaintiff could sue the national bank under state anti-discrimination law. To be sure, in dictum, Justice Kennard stated her view that, if the plaintiff

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[2]Cases involving the issue whether an at-pleasure provision preempts state common-law wrongful discharge claims, such as *Andrews v. Federal Home Loan Bank of Atlanta*, 998 F.2d 214 (4th Cir. 1993), cited in the petition (at 14), are inapposite, because they do not involve state-law statutory employment discrimination claims with analogues in federal employment discrimination law. The petition tacitly concedes this point by limiting the question presented to whether Ms. Kroske's "state employment discrimination law" claim is preempted in light of Congress's enactment "of a federal employment discrimination law." Pet. i.

had been an officer, the National Bank Act's at-pleasure provision would have preempted the California anti-discrimination claim. But that aspect of Justice Kennard's opinion was entirely unnecessary to her conclusion that the plaintiff's claim could proceed. *Id.* at 559.

In a dissent joined by two other justices, Justice Brown stated that the National Bank Act barred Ms. Peatros from suing the bank on *any* state-law discrimination claim, regardless of its scope. *Id.* at 559 (Brown, J., dissenting). Justice Brown's view appears to have been animated, in part, by her belief that even *federal* statutory anti-discrimination claims may be precluded by the National Bank Act, a view that no court has ever embraced and that petitioner here rejects. *See id.* at 560-61 (Brown, J., dissenting).

By cobbling together Justice Kennard's dictum and the Brown dissent, for a supposed 4-to-3 pro-preemption precedent, petitioner claims a conflict that will purportedly create disarray among the state and federal courts in California. To justify its position, petitioner cites a 1914 decision, *Del Mar Water, Light & Power Co. v. Eshleman*, 140 P. 948, 948 (Cal. 1914), for the broad notion that "a legal proposition supported by four or more justices of the California Supreme Court is recognized as the holding of that court." Pet. 10 n.1. *Del Mar* does not remotely stand for that proposition. Rather, it stands for the unremarkable view that if a proposition does not garner the views of four justices, it cannot serve as the opinion of the Court for the purpose of according relief to the parties. *See Del Mar*, 140 P. at 948 ("[I]n the decision of a case before the court in bank the concurrence of at least four justices is necessary, and that any proposition or principle stated in an opinion is not to be taken as the opinion of the court, unless it is agreed to by at least four of the justices."). *Del Mar* does not suggest, let alone require, that every view expressed by four justices *must*

be considered *a controlling precedent* of the California Supreme Court. More importantly, *Del Mar* does not even intimate that a three-justice dissent, together with a dictum from a justice who joined the lead opinion, should, let alone must, be considered controlling precedent. The very most that can be said from petitioner's perspective is that the opinions in *Peatros* establish no law on the question presented.

But there is no need to parse a 1914 decision to ascertain *Peatros*'s value as precedent because we know how *Peatros* has actually been viewed in the California courts. A raft of precedential rulings have treated the Mosk opinion (rather than the Kennard dictum and/or the Brown dissent) as the precedent of the court. The California Supreme Court itself has cited the Mosk opinion in two majority rulings, but has never cited either the Kennard or Brown opinion. First, in *Nordyke v. King*, 44 P.3d 133, 138 (Cal. 2002), in a ruling joined by Justice Kennard, the court called the Mosk opinion the "lead opinion" and described it as holding that the "National Banking Act preempts the state Fair Employment and Housing Act to the extent that the two conflict, but does not to the extent that they do not." Second, in the unanimous decision in *Jevne v. Superior Court*, 111 P.3d 954, 971 (Cal. 2005), Justice Kennard herself invoked the Mosk opinion for the proposition that preemption occurs to the extent of conflict between federal and state law, but no further.

Similarly, precedential opinions of the California Courts of Appeal have repeatedly treated the Mosk opinion (and not the Kennard dictum and/or the Brown dissent) as the opinion of the court on matters of preemption jurisprudence.[3]

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[3]*See City of Rancho Palos Verdes v. Abrams*, 124 Cal. Rptr. 2d 80, 86 (Cal. Ct. App. 2002); *Gentry v. eBay*, Inc., 121 Cal. Rptr. 2d 703, 715 n.8 (continued...)

On the other hand, the best that petitioner can muster is a lonely unpublished decision of the California Court of Appeal, *Pereira v. Bank of America*, 2002 WL 221984 (Cal. Ct. App. Feb 13, 2002). Petitioner's use of *Pereira* is puzzling. First of all, because *Pereira* is unpublished, it is not authority, binding or otherwise, anywhere in California, and it may not be cited as precedent under California Rule of Court 977(a). *See Pereira*, 2002 WL 221984. Thus, there is virtually no chance that *Pereira* will help transform Justice Brown's dissent into a controlling precedent.[4]

Moreover, petitioner cites *Pereira* as evidence that "the [California] Courts of Appeal"—stated in the plural—are treating the Brown dissent and/or the Kennard dictum as the ruling of the court in *Peatros*. *See* Pet. 10 n.1. That is simply not so. The unpublished decision in *Pereira* is the *only* opinion even suggesting that reading of *Peatros*.

In sum, in the face of numerous California Supreme Court and Court of Appeal rulings treating the Mosk opinion as authoritative, petitioner has manufactured a conflict where none exists.

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[3](...continued)
(Cal. Ct. App. 2002); *Gibson v. World Sav. & Loan Ass'n*, 128 Cal. Rptr. 2d 19, 23 (Cal. Ct. App. 2002); *Kanter v. Warner-Lambert Co.*, 122 Cal. Rptr. 2d 72, 86 (Cal. Ct. App. 2002); *Black v. Financial Freedom Senior Funding Corp.*, 112 Cal. Rptr. 2d 445, 452 (Cal. Ct. App. 2001); *see also Monarch Healthcare v. Superior Court*, 93 Cal.Rptr.2d 619, 624 (Cal. Ct. App. 2000) (citing Mosk opinion for principle of statutory interpretation).

[4]Even among unpublished decisions, *Pereira* is an outlier. For example, in *Drolla v. ChevronTexaco Corp.*, 2004 WL 2750328, at *6 n.11 (Cal. Ct. App. Dec. 2, 2004), the court explicitly treated the Mosk opinion's views on preemption as a holding of the California Supreme Court. *See also Armed Forces Ins. v. United Services Auto. Ass'n*, 2005 WL 2436656, at *2 (Cal. Ct. App. Oct. 3, 2005); *Varr v. Olimpia*, 2002 WL 1425373, at *12 (Cal. Ct. App. July 1, 2002).

B. The Lack Of Finality Of The Ninth Circuit's Ruling Underscores The Conclusion That Review Should Be Denied.

Petitioner ignores another compelling reason to deny review: the interlocutory nature of the ruling below. Although this Court has jurisdiction to review interlocutory decisions of federal courts of appeals under 28 U.S.C. § 1254(1), it seldom does so, and this case is not the rare case in which interlocutory review is appropriate. "Ordinarily, in the certiorari context, 'this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.'" Robert L. Stern, et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002) (quoting *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893) (emphasis added)); *see also, e.g., Hamilton-Brown Shoe Co. v. Wolf Bros. Co.*, 240 U.S. 251, 258 (1916) (interlocutory decisions are reviewed only "in extraordinary cases").

The posture of this case is anything but extraordinary. Ms. Kroske filed a garden-variety state-law age discrimination claim in state court. Assuming the facts alleged by Ms. Kroske to be true, the district court granted summary judgment to the defendant bank on the purely legal ground that the National Bank Act preempts her WLAD claim. The Ninth Circuit reversed and held that the district court erred in its preemption ruling, sending Ms. Kroske's claim back to the district court for further proceedings. On remand, the bank will retain all other legal defenses it may have, and the trier of fact will be free to decide in favor of the bank on any lawful ground. If the bank prevails on the merits of the age discrimination issue or on any other dispositive ground, review on the question presented in the petition would not be necessary (or appropriate).

This case is a less appropriate vehicle for immediate,

interlocutory review than was true in *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (*VMI*). There, the Fourth Circuit had issued a final decision holding that the Commonwealth of Virginia's sponsorship of a military college for men only was unconstitutional, but the district court had yet to rule on the appropriate remedy. The Court denied certiorari on the ground that the decision was not sufficiently final because the remedy phase had not been completed. *See id.* at 946 (Scalia, J., concurring). The Court recognized that there would be time enough to review the decision if that were necessary after the remedial portion of the case had concluded, *id.*, and, in fact, it later did so. *See United States v. Virginia*, 518 U.S. 515 (1996). Here, there is no decision regarding liability, let alone the appropriate remedy.

Of course, Ms. Kroske believes that she will prevail on the merits. If she does, the bank may appeal from the final decision and, ultimately, petition the Court on the preemption question (and any other federal issue). *See VMI*, 508 U.S. 946 (Scalia, J., concurring). Moreover, unlike the *VMI* case, which was sui generis, here, if petitioner is correct that the appellate courts will, someday, become seriously conflicted, the question presented will arise frequently, and there will be any number of appropriate future vehicles that would allow this Court to resolve it. In the meantime, the Court should stay its hand and allow Ms. Kroske's case to run its course.

C. The Merits Of The Court Of Appeals' Ruling Provides No Basis For Review.

Because Ms. Kroske's case presents no conflict in appellate authority and lacks finality, there is no compelling reason to delve into the merits of the decision below. The petition's faulty analysis of the merits, however, demands a rejoinder.

1. As explained above (at 7-10), when read in the context of its enactment in the mid-1860's, the National Bank Act's at-pleasure provision is most sensibly seen as clarifying that,

absent contrary positive law, a national bank officer who lacks contractual protection for a specified term may be dismissed without cause. Thus, just as 12 U.S.C. § 24 (Fifth) does not override the ADEA—which injects a federal non-discrimination obligation into every employment contract, whether or not at-will—it does not override state age discrimination laws, such as the WLAD, which do the same as a matter of state law.

That the National Bank Act's at-pleasure provision applies only to the *dismissal* of bank officers underscores that it does not extend beyond the principal purpose of the at-will employment doctrine: to authorize an employer to *dismiss* an employee without cause. By contrast, federal and state employment discrimination laws apply to the terms and conditions of the entire employment relationship, including hiring, pay, and benefits, as well as dismissal. Although petitioner claims that it is free to fire all of its bank officers in violation of any state employment discrimination law, it does not (and cannot) argue that, under the at-pleasure provision, it may refuse to *hire* bank officers in violation of those laws. Our point here is not to unveil an inconsistency in petitioner's position, but to demonstrate that a provision aimed at assuring that national banks may *dismiss* their officers without cause cannot sensibly be read to negate a state statute aimed not at imposing a for-cause regime, but at prohibiting one kind of employer misconduct —*discrimination*—in all aspects of the employment relationship.

2. Petitioner's characterization of state anti-discrimination law as anathema to the National Bank Act's interest in the uniformity of federal law fundamentally misconceives the interaction of the ADEA and its state-law counterparts. As the court of appeals explained, *see* Pet. App. 22a, far from being independent of, or at odds with, state law, the ADEA relies on state law as the front-line enforcement mechanism for achieving its basic anti-discrimination purpose. *See* 29 U.S.C. §§ 633, 626. Petitioner seeks to avoid the import of these provisions by

characterizing them as mere procedures that an ADEA claimant must employ before turning to federal procedures. Pet. 17-18 n.2. But examination of the ADEA provisions demonstrate significant deference to state *substantive* law. First, 29 U.S.C. § 633(a)—which provides that "[n]othing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices"—is best understood as an *anti*-preemption provision. It effectively allows an employment discrimination claimant to employ state processes to vindicate her rights under state substantive law, even though the ADEA creates a federal right of action based on federal substantive law. *Cf. California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *id.* at 295-96 (Scalia, J., concurring in the judgment).

Moreover, the ADEA not only *permits*, but *requires*, a claimant to seek relief under applicable state law. Under 29 U.S.C. § 633(b), when state procedures are available, an age discrimination claimant must use those procedures to seek relief *under that state's age discrimination law* before filing suit under federal law. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 754-58 (1979); 29 U.S.C. § 633(b) (referring to proceedings "commenced under the state law."). And in such situations, the ADEA extends the period for filing a federal claim with the EEOC, *id.* § 626(d), to provide the claimant with a meaningful opportunity to obtain relief under *state law* before having to decide whether to seek a federal remedy. *See Oscar Meyer*, 441 U.S. at 756 (the ADEA's state deferral procedures are "intended to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state proceedings."). The ADEA thus incorporates and embraces state substantive age discrimination law. That being the case, a holding that the National Bank Act's at-pleasure provision overrides the WLAD would effectively negate the specific scheme for eradicating workplace discrimination adopted by Congress in the

ADEA—a law that petitioner acknowledges protects national bank officers from age-based dismissal.

3. The court of appeals held that Ms. Kroske's WLAD claim may go forward because it substantively mirrors a claim available under the ADEA. Petitioner asserts that lower courts will have difficulty deciding what "may or may not" be "substantive." Pet. 20. At best, that assertion is speculative and provides no basis for review now, before the lower courts have encountered any such difficulty.

But the ruling below will not be difficult to apply. The question under the court of appeals' decision is whether the state law's substantive standard for determining discrimination mirrors that of the ADEA. *Cf. Medtronic, Inc. v. Lohr*, 518 U.S. 470, 495-97 (1996) (federal-law duties do not preempt equal or substantially identical state-law duties, even if state law provides a remedy unavailable under federal law); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 447-49 (2005) (same). Petitioner does not challenge the identity between the WLAD and the ADEA in that regard; rather, it complains that Ms. Kroske is seeking compensatory damages of a kind assertedly unavailable under the ADEA. *See* Pet. 20. At this juncture, because this case is in its infancy, *see supra* Part B, it is impossible to know whether Ms. Kroske will be found entitled to state-law relief that differs from the full range of make-whole relief available under the ADEA such as back pay and benefits, reinstatement or front pay, and liquidated damages. *See* 29 U.S.C. §§ 626(b), (c); *see also Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982) (hypothetical or potential conflicts are insufficient to warrant preemption of state law).

More importantly, the form of relief to which Ms. Kroske may be entitled does not alter the fact that the substantive liability standard under the WLAD mirrors that of the ADEA. Pet. App. 21a. If, as petitioner proclaims, uniformity is what matters, petitioner should be concerned with whether

differences between state and federal law make it difficult for national banks to conform their primary conduct to a federal anti-discrimination norm that prohibits banks from dismissing officers on account of their age. There is no reason to believe that national banks' treatment of their older employees will depend on whether they are potentially liable for the extensive relief available under the ADEA or, in some states, other types of monetary relief.[5]

4. The court of appeals correctly noted that a state-law discrimination claim presumptively withstands an assertion of federal preemption because, when enacted pursuant to a state's

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[5]Two other areas of potential state-law variation cited by petitioner are irrelevant in the context of this case. Petitioner notes that although the ADEA applies only to employers with 20 or more employees, some states have a lower threshold. Pet. 21. But the at-pleasure provision here involves only one kind of employer—a national bank—and it is very unlikely that there are any national banks with fewer than 20 employees. (Petitioner is one of the principal subsidiaries of U.S. Bancorp, which, as of the end of 2005, had just under 50,000 employees. U.S. Bancorp 2005 Annual Report and Form 10-K, p. 11, available at http://www.sec.gov/Archives/edgar/data/36104/000095013406004429/c01303e10vk.htm.) Similarly, petitioner observes that some state age discrimination statutes protect workers younger than 40, which is the minimum age for protection under the ADEA. *See* Pet. 20-21. But the minimum age is also 40 under the WLAD. Wash. Rev. Code §§ 49.44.090(1), 49.60.205. Moreover, Ms. Kroske was 51 when she was fired. *See* Pet. App. 4a. Thus, her case is not an appropriate vehicle for deciding whether the National Bank Act's at-pleasure provision authorizes national banks to fire officers under 40 on account of their age even where state law prohibits such firings.

Petitioner also claims that the decision below "creates confusion as to what to do" about differences among the administrative procedures that accompany the states' anti-discrimination laws. Pet. 21. As explained earlier (at 16-18), the ADEA specifically incorporates those procedures. *See* 29 U.S.C. §§ 633, 626(d). Therefore, those procedures, whether or not uniform, are no basis for holding state substantive law preempted. In any event, differences among administrative procedures will not affect the primary conduct of a national bank because they have nothing to do with the standard for dismissal of a national bank officer.

historic police powers, state law is ousted only when preemption is the "clear and manifest purpose of Congress." Pet. App. 9a (citing cases); *see DeCanas v. Bica*, 424 U.S. 351, 356 (1976) ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State."). Petitioner claims that this presumption against preemption does not apply when the state regulates in an area historically occupied by the federal government. Pet. 25-27; *see United States v. Locke*, 529 U.S. 89, 108 (2000). That truism does not apply here because the National Bank Act does not occupy the relevant field. Petitioner appears to take the position that if the National Bank Act displaces all state authority in core areas of bank regulation—a point that need not be addressed in this case—Congress must have also done so with respect to all other activities of national banks. But such an assumption is contrary to the reality of regulation under the National Bank Act, which, for instance, has never entered the field of employment discrimination. *See* Pet. App. 11a (citing examples of state bank regulations that are preempted and those that are not).

Petitioner's position is also inconsistent with this Court's preemption jurisprudence, which treads lightly on the state's traditional regulatory prerogatives. *See, e.g., Medtronic*, 518 U.S. at 485. The Court has held, therefore, that even where an Act of Congress preempts certain state laws that directly conflict with that Act's basic purposes, related state law may be unaffected. For instance, in *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), the Court held preempted a state-law damages claim that a medical device's approval under the Food, Drug, and Cosmetic Act was procured by fraud on the Food and Drug Administration. Because "[p]olicing fraud against federal agencies" is not a function historically performed by the states, *id.* at 347, the presumption against preemption did not apply. In the same breath, however, the Court contrasted the fraud-on-the-agency claim with a

traditional state-law damages claim for a manufacturer's defective design and manufacture of a medical device approved under the very same Act, because of "federalism concerns and the historic primacy of state regulation of matters of health and safety[.]" *Id.* at 348 (quoting *Medtronic*, 518 U.S. at 485).[6]

Similarly, the National Bank Act does not sweep away all state law that might touch on the operation of national banks. As early as 1869, the Court had concluded that the national banks were "subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation." *First Nat'l Bank v. Commonwealth of Kentucky*, 76 U.S. 353, 362 (1869). As the Court has recently explained, states may regulate national banks when "doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 33 (1996). Measured against either the general purposes of the National Bank Act or the specific purpose of its at-pleasure provision, Ms. Kroske's WLAD claim would not significantly interfere with petitioner's bank powers.

Commentators have identified Congress's three general

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[6]The petition's effort to transform the court of appeals' brief statement regarding the presumption against preemption into a second question presented is unavailing. The petition's reliance (at 26-27) on recent appellate decisions regarding the presumption against preemption under the National Bank Act, one of which this Court has agreed to review, *see Watters v. Wachovia Bank, N.A.*, No. 05-1342 (cert. granted June 19, 2006), is off the mark. Those cases concern states' efforts to regulate the mortgage lending activities of national bank subsidiaries and have nothing to do with whether the presumption against preemption applies to the states' traditional role in regulating employment relations. Contrary to the petition's assertion (at 26), the court of appeals explicitly acknowledged that the presumption against preemption does not apply when state law seeks to invade an arena of exclusive and longstanding federal control, *see* Pet. App. 9a, but recognized that policing employment discrimination is not such an arena. *See id.* at 8a-9a.

objectives in enacting the National Bank Act: (1) to develop a national currency; (2) to create markets for federal bonds to finance the Civil War and (3) to use the national banks as depositories of government funds. *See* Edward L. Symons, Jr. *The 'Business of Banking' in Historical Perspective*, 51 Geo. Wash. L. Rev. 676, 699 (1983); Geoffrey P. Miller, *The Future of the Dual Banking System*, 53 Brook. L. Rev. 1,13 (1983). State anti-discrimination legislation conflicts with none of these objectives.

Specifically, the at-pleasure provision was intended to permit a national bank to remove an officer who had lost the public's trust and whose conduct undermined the bank's financial integrity. *See, e.g., Wells Fargo Bank N.A. v. Superior Court,* 811 P.2d 1025, 1029 (Cal. 1991) (quoting *Westervelt v. Mohrenstecher*, 76 F. 118, 122 (8th Cir. 1896)) (Congress included the at-pleasure provision to protect "the safety and prosperity of banking institutions" and to avoid public concern surrounding those "officers, to whose integrity and discretion the moneys and property of the bank and its customers are intrusted"); Pet. App. 13a-14a ("original congressional intent behind the at-pleasure provision of the Bank Acts was to ensure the financial stability of the banking institutions by affording them the means to discharge employees who were felt to compromise an institution's integrity") (quoting Sharon A. Kahn & Brian McCarthy, *At-Will Employment in the Banking Industry: Ripe for a Change*, 17 Hofstra Lab. & Emp. L.J. 195, 215 (1999)); *see generally Westervelt*, 76 F. at 122.

Nothing in state anti-discrimination law—which permits an employer to dismiss an employee for any reason other than a discriminatory reason—conflicts with these purposes. Indeed, the public trust in our national banks is undermined, not promoted, by a rule that gives the banks authority to discharge officers on the basis of the officers' race, color, national origin, age, sex, or religion. For that reason as well, the Court should deny review and allow Ms. Kroske's case to proceed on its

merits.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION,

Petitioner,

v.

KATHY KROSKE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF

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RESPONDENT'S SUPPLEMENTAL BRIEF

Shortly after respondent Kathy Kroske filed her opposition, the Third Circuit decided *Fasano v. Federal Reserve Bank of New York*, ___ F.3d ___, 2006 WL 2193096 (3d Cir. Aug. 3, 2006). In the many decades since states began enacting anti-discrimination statutes, *Fasano* is only the third federal court of appeals ever to have considered the question whether a federal statutory at-pleasure provision preempts a plaintiff's claim under a state anti-discrimination statute. For two reasons, *Fasano* underscores that review should be denied in this case.

First, *Fasano* concerned the preemptive scope of the at-pleasure provision of the Federal Reserve Act, *not* the National Bank Act at issue in this case. Although Ms. Kroske believes that none of the federal at-pleasure provisions preempts state statutory anti-discrimination claims, as explained in the opposition (at 7-10), the differences between the two statutes remain a compelling reason, among others, to deny review in this case.

Second, *Fasano* cited the decision below with approval. It noted in particular the Ninth Circuit's holding that a state-law age discrimination claim is not preempted by the National Bank Act's at-pleasure provision as long as the state-law claim is consistent with "the prohibited grounds for termination under the ADEA." *Fasano*, 2006 WL 2193096, at *9 (quoting *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 989 (9th Cir. 2005)). *Fasano* thus held that the Federal Reserve Act's at-pleasure provision does not preempt a state anti-discrimination law that is consistent with federal law. *Id.* at *10. As a result, *Fasano* preserves the status quo: The total preemption position advanced by petitioner here has been embraced only in the Sixth Circuit's unreasoned 1987 decision in *Ana Leon T. v. Federal Reserve Bank of Chicago*, 823 F.2d 928 (6th Cir.

1987). Like other courts, *see* Opp. 4, *Fasano* criticized *Leon* for "provid[ing] no analysis to support its conclusion[.]" 2006 WL 2193096, at *8.

In applying its holding, *Fasano* found the plaintiff's state-law claim preempted, in part because the relevant New Jersey anti-discrimination statute imposes a liability standard for proving disability that is considerably more lenient than that imposed by federal law. *Id.* at *11. We recognize that the Third Circuit also relied on differences between New Jersey's administrative exhaustion scheme and available remedies and those provided by federal law. *Id.* at *11-*12. In our judgment, that reference to procedural and remedial differences between state and federal law were not dispositive, and they should have been irrelevant to the court's analysis. Because New Jersey's administrative procedures and remedies do not alter the standard of conduct to which an employer must conform, they are not preempted by federal law. *See* Opp. 18-19.

The Third Circuit's error is not germane here, and not simply because the Third Circuit was attempting to apply the same standard as that enunciated by the court of appeals below. The plaintiff in *Fasano* did not claim age discrimination, as does Ms. Kroske here. Rather, the plaintiff in *Fasano* claimed that she was discriminated against on account of her disability and that, in responding to her complaints, her employer had violated the state whistleblower protection law. As explained in the opposition (at 16-18), particular provisions of the ADEA demonstrate that federal law embraces, rather than conflicts with, state substantive age discrimination law. Those ADEA provisions provide a powerful, and highly specific, reason why state age discrimination laws are not preempted by the National Bank Act's at-pleasure provision.

CONCLUSION

The petition for a writ of certiorari should be denied.

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

A. Respondent Misreads Federal And State Appellate Case Law In An Attempt to Avoid The Conflict That Warrants This Court's Review, And The Third Circuit Has Now Broadened The Conflict

Congress has used the dismissal "at pleasure" language in three of the primary statutes governing the Nation's banking system, one of which dates back more than 100 years. But modern authority from the Third, Sixth and Ninth Circuits and the California Supreme Court are now in disarray as to the meaning and effect of that language. It is plain that this conflict of authorities will persist absent this Court's review. Delay now will only lead to further uncertainty, the application of divergent state law standards, and costly litigation on issues ultimately collateral to the preemption question in the instant dispute, litigation which Congress intended to preempt for the federal banking industry.

1. The Sixth Circuit has twice held that state antidiscrimination laws are preempted by federal dismissal "at pleasure" provisions, in direct conflict with the Ninth Circuit ruling below. Respondent's claim to the contrary is flatly wrong. Indeed, the Ninth Circuit acknowledged the Circuit split, declaring that it "disagree[d]" with the Sixth Circuit's conclusion in *Ana Leon T. v. Federal Reserve Bank of Chicago*, 823 F.2d 928 (6th Cir.), *cert. denied*, 484 U.S. 945 (1987). Pet. App. 16a-17a.

Moreover, the Third Circuit has now expanded the federal circuit conflict, holding in *Fasano v. Federal Reserve Bank of New York*, ___ F.3d ___, 2006 WL 2193096 (3d Cir. Aug. 3, 2006), that federal dismissal "at pleasure" authority preempts a claim under state employment discrimination law that "grants greater substantive, procedural, or remedial protections than those already permitted" under federal law, as does the state law here. *Id.* at 17.

a. Respondent attempts to avoid this federal circuit conflict by misstating the Sixth Circuit ruling in *Leon* and engaging in extended, unsupported speculation that that opinion may have meant something different and apparently, in

her view, could have or likely involved a different claim than it did. Opp. 5-7. *Leon* held that the employee's claim of national origin discrimination under the state antidiscrimination employment law was "preempted by federal law" which provides that "employees of a Federal Reserve Bank may be dismissed 'at pleasure.'" 823 F.2d at 931. Kroske suggests that that holding is nonetheless consistent with the opposite result in this case because, she argues, the federal and state law causes of action in *Leon* were not "substantively the same." She asserts that they were not the same because the only state law claim that could have been at issue in *Leon* was one based on disability discrimination, which was not yet covered by federal law. She declares that the plaintiff there could not have had a national origin discrimination claim under state law because the Sixth Circuit noted that the Michigan statute "does not prohibit national origin discrimination." Opp. 5-6.

But the Sixth Circuit said nothing of the kind. That court stated the precise opposite – that the Michigan statute prohibited an employer from discriminating "on account of race, color, *national origin*, religion, age, sex, weight, height, or marital status." *Leon*, 823 F.2d at 931 (emphasis added). And it is clear that the court addressed a state law claim of national origin discrimination by the plaintiff, reasoning that the national origin claim "could not have been brought" under state law because it was *preempted* by the dismissal "at pleasure" provision (not because state law did not cover it). The Sixth Circuit further specified that, although the plaintiff's national origin claim could not be brought under state law, it could have been brought under federal law (which it remanded for a determination of whether it was properly brought). *Ibid.*

Respondent also attempts to dismiss the Sixth Circuit's express adherence to *Leon* just two years ago in *Arrow v. Federal Reserve Bank of St. Louis*, 358 F.3d 392 (6th Cir. 2004). Opp. 5 n.1. Kroske baldly asserts that the Sixth Circuit will likely reconsider *Leon* in a future case. *See* Opp. 3-5, 7. Of course, *Arrow* is evidence to the contrary, which respondent attempts to discount by stating that "[t]he plaintiff in *Arrow* did not seek en banc review." Opp. 5 n.1. But if the Sixth Circuit were inclined to reconsider *Leon* it could have done so without such a petition. *See* 6th Cir. I.O.P.

35(c) ("[A]ny member of the en banc Court may sua sponte request a poll for hearing or rehearing en banc prior to the filing of an en banc petition by a party."). Furthermore, as Kroske herself notes, other courts had criticized *Leon* prior to *Arrow*, but that did not prevent the Sixth Circuit from reaffirming *Leon*. (Of course, there also had been support for *Leon*. *See, e.g.*, *Andrews v. Federal Home Loan Bank of Atlanta*, 998 F.2d 214, 220 (4th Cir. 1993).) [1] As such, the court of appeals' holding in *Leon* is entrenched Sixth Circuit precedent and there are no signs that it would be a likely candidate for reconsideration. Respondent's suggestion that the conflict is of limited import is belied by its own citation to the disarray among the lower courts on the issue. Opp. 4.

b. Indeed, the scope of the Circuit split widened when the Third Circuit held in *Fasano v. Federal Reserve Bank of New York*, that a state law employment discrimination claim must be dismissed because the state law was preempted by federal dismissal "at pleasure" authority. The Third Circuit canvassed the disagreement among the courts, characterizing the Fourth and Sixth Circuits as having found "total preemption" of state statutory employment law, 2006 WL 2193096 at *9, and describing a "variety" of other courts, including the Ninth Circuit and the California Supreme Court, as "taking the more limited approach of partial conflict preemption of state employment laws," preempting state laws "only to the extent that the state laws provide additional remedies or liability *beyond* the federal antidiscrimination laws," *ibid.* (emphasis in original). This analysis further confuses lower court precedent because it misconstrues several of those cases by overstating the holding of the Fourth Circuit (*see* note 1, *supra*; Pet. 14); misreading California precedent (*see* pages 6-8, *infra*); and

[1] The Fourth Circuit in *Andrews* cited *Leon* for the proposition that "Congress intended for federal law to define the discretion which the Bank may exercise in the discharge of employees." *Id.* at 220. That ruling, although not necessarily in direct conflict, is in significant tension with the ruling below. However, as discussed *infra*, *Andrews* has been categorically construed by the Third Circuit as conflicting with the Ninth Circuit's ruling.

replacing the Ninth Circuit's "substantively mirrors" standard in this case with a standard that a suit based on state antidiscrimination law that is not "*exactly* analogous" to federal law is preempted. 2006 WL 2193096 at *4 (emphasis in original).

There is no question that under its *Fasano* reasoning, the Third Circuit would have reached a different result in this case than did the Ninth Circuit because Washington state employment law "grants greater substantive, procedural, or remedial protections than those already permitted" under the ADEA. *Id.* at *6. Washington law allows emotional distress damages and, thus, "impermissibly frustrate[s]" Congress's intent to provide national banks with the "widest latitude possible" to hire and fire officers "in order to maintain the public trust," *ibid.*; *see also id.* at *10 (citation omitted). The Third Circuit is unequivocal that the claim must be dismissed in such circumstances because federal courts cannot rewrite state statutes. *Id.* at *12-13.[2]

c. Kroske attempts to avoid the circuit split with the Sixth Circuit (and now with the Third Circuit) by arguing that cases interpreting the Federal Reserve Act's dismissal "at pleasure" provision are not relevant in determining the meaning of the same language in the National Bank Act, 12 U.S.C. § 24 (Fifth). Opp. 7-8. That argument is flawed for three independent reasons (and is contrary to respondent's position below, *see* C.A. Resp. Br. 36).

First, respondent is wrong that the common law differed when the two statutes were enacted. When Congress first enacted the dismissal "at pleasure" language in 1863 in the National Bank Act, the common law already had adopted the default of employment at-will, which respondent concedes was the common law at the time of the enactment of the Federal Reserve Act in 1913.[3] Respondent's reliance on a

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[2] The Third Circuit's decision in *Fasano* involves other significant issues pertaining to federal reserve banks that are unrelated to the dismissal "at pleasure" authority.

[3] *See, e.g., Hunt v. The Otis Co.*, 45 Mass. 464, 466-467 (1842); *Blaisdell v. Lewis*, 32 Me. 515, 516 (1851); *Butler v. Smith & Tharp*, 35

(Continued on following page)

single, modern academic argument, Opp. 8-9, cannot override that fact or somehow support Kroske's claim that the National Bank Act's dismissal "at pleasure" merely established that bank officers were employees at-will, whereas the Federal Reserve Bank's same provision did something more, particularly when Kroske contends that even the latter does not preempt state statutory employment discrimination laws. Opp. 9. Furthermore, Congress would have understood in 1863 that the grant of power to national banks to dismiss officers "at pleasure" would preempt state statutes and not just common law. The at-will doctrine had been codified in some state laws by that time with modifications. *See* La. Civ. Code, Art. 57 (1808); *see also* Cal. Civ. Code § 1999 (1872) (adopting the 1865 Field Code provisions on employment at-will and exceptions); Dakota Territorial Civ. Code § 1152 (1877) (same).[4]

Second when Congress enacted the Federal Reserve Act, it purposefully borrowed the "at pleasure" language from the National Bank Act because it intended federal reserve banks "to take out a charter *in the same manner and with similar powers as a national bank*." S. Rep. No. 63-133, Pt. 2, at 9 (1913) (emphasis added).

Third, every court to consider the dismissal "at pleasure" provisions in the various federal banking statutes has interpreted the statutes *in pari materia* – including the Sixth Circuit in *Arrow* and the Third Circuit in *Fasano* – because

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Miss. 457, 464 (1858); Deborah A. Ballam, *The Traditional View on the Origins of the Employment-at-Will Doctrine: Myth or Reality*, 33 Am. Bus. L.J. 1, 47 (1995) ("The analysis of legal and non-legal evidence from [Pennsylvania, New York, Massachusetts, and Maryland] provides substantial evidence that employment-at-will was always the standard in these four states, for all classes of laborers, except for a short period of time in colonial Massachusetts.").

[4] Kroske's argument that The National Bank Act's dismissal "at pleasure" provision can only codify at-will employment because it applies only to dismissal of bank officers and not their hiring, Opp. 16, is nonsensical because Congress would not have conferred authority to dismiss "at pleasure" for safety and soundness purposes, but then permit States to require the hiring (or re-hiring) of individuals who threaten the integrity of the financial institution.

the statutes use virtually identical language to convey authority to federally chartered banking institutions. *See, e.g.*, Pet. App. 12a n.2; *Mele v. Federal Reserve Bank of New York*, 359 F.3d 251, 255 (3d Cir. 2004); *Arrow*, 358 F.3d at 394; *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093, 1097 n.3 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982); *Kispert v. Federal Home Loan Bank*, 778 F. Supp. 950, 952-953 (S.D. Ohio 1991); *Fasano*, 2006 WL 2193096 at *7.

2. Kroske's contention that there is no conflict between the Ninth Circuit's decision below and California courts equally lacks merit. Kroske tries to drive a wedge between the opinions of Justice Kennard and then-Justice Brown in the California Supreme Court's decision in *Peatros v. Bank of America NT & SA*, 990 P.2d 539 (Cal. 2000), by arguing that each proposes a different preemption result. Opp. 11. Once again, however, Kroske misreads the relevant opinions.

Justice Kennard explicitly stated that, on the question of preemption, she "agree[d] with Justice Brown that the [National Bank Act] fully preempts a state law [Fair Employment and Housing Act] cause of action. For in that situation, the state law claim conflicts with the objectives of the National Bank Act." *Id.* at 559 n.1. Accordingly, a majority of the California Supreme Court agrees with the Sixth Circuit and explicitly rejects the reasoning that was adopted by the Ninth Circuit below.[5]

Nor is the precedential force of Justices Kennard's and Brown's opinions undermined by Kroske's purported

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[5] Kroske's statement that the preemption "aspect of Justice Kennard's opinion was entirely unnecessary to her conclusion that the plaintiff's claim could proceed" is inaccurate. Opp. 11. As applied to that plaintiff, Justice Kennard found "no preemption because [she did] not share the lead opinion's view that plaintiff is an officer within the meaning of the National Bank Act." *Peatros*, 990 P.2d at 557. For such a non-officer plaintiff, Justice Kennard explained that she "would not place any limitation on plaintiff's state law claims," *ibid.*, something that the lead opinion did. Rather than agree with the lead opinion's analysis, Justice Kennard reviewed the partial preemption reasons of the lead opinion, expressly rejected it, and directly stated that she could not "join the lead opinion's conclusion of partial preemption of FEHA by the National Bank Act." 990 P.2d at 559.

explanation of "how *Peatros* has actually been viewed in the California courts." Opp. 12. Not one of the decisions that Kroske cites addresses the federal dismissal "at pleasure" authority, let alone whether that federal power preempts state employment discrimination laws. Neither of respondent's two citations to California Supreme Court decisions provides Kroske with any support. *Nordyke v. King*, 44 P.3d 133 (Cal. 2002), involved the question of whether a *state* law preempts a county ordinance, and thus has no bearing on questions of *federal* preemption. *Jevne v. Superior Court*, 111 P.3d 954 (Cal. 2005), quoted the *Peatros* lead opinion for general conflict preemption principles pertaining to the preemptive effect of National Association of Securities Dealers rules. Likewise, the bevy of California Courts of Appeal cases Kroske cites is inapposite.[6]

Kroske, of course, tries to deny giving any significance to *Pereira v. Bank of America, N.T. & S.A.*, 2002 WL 221984 (Cal. Ct. App. Feb. 13, 2002). Opp. 13. *Pereira* is directly analogous to the instant dispute, however. In affirming the dismissal of a state employment discrimination suit by a former bank officer on federal preemption grounds, that court relied on the fact that "four justices of the Supreme Court hold that section 24, Fifth, preempts all state law causes of action brought by bank officers. It is this view that has precedential force." *Pereira*, 2002 WL 221984, at *3.[7]

Kroske's complaint that *Pereira* is not published and thus cannot be cited as precedent in California courts is

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[6] Some of the decisions Kroske invokes cite the three-judge lead opinion in *Peatros* for reasons unrelated to federal preemption, including, for example, questions of state law interpretation of discovery rules, and the standard of review on summary judgment. Even where the opinion is cited for general preemption principles it has no effect on the instant dispute because the lead opinion erred not in its statement of those principles, but in their application to the National Bank Act. Opp. 12-13.

[7] For this proposition, the California court cites *Del Mar Water, Light & Power Co. v. Eshleman*, 140 P. 591 (Cal. 1914). Respondent thus ignores that the interpretation of *Del Mar Water, Light & Power Co.*, to which she objects, is not U.S. Bank's but rather is the state law construction of that opinion by the California Court of Appeal.

wholly irrelevant. *Pereira* demonstrates that California courts will view themselves bound by Justices Kennard's and Brown's opinions in cases involving the specific question of National Bank Act preemption pursuant to Section 24 (Fifth).

Pereira also illustrates the significant problem within California created by the decision below, and Kroske has no answer for that. As petitioner explained, Pet. 18, California district courts are now bound by the Ninth Circuit's holding below and will be required to permit California employment discrimination suits by bank officers to go forward, notwithstanding the fact that California courts, such as the court in *Pereira*, are bound by the *Peatros* holding that the National Bank Act preempts those very same state law causes of actions. This federal and state court intrastate conflict will create significant confusion and forum shopping, thus warranting this Court's immediate review. *See also White v. Federal Reserve Bank*, 660 N.E.2d 493 (Ohio Ct. App. 1995) (reflecting similar intrastate conflict between state and federal courts in Ohio).

B. This Court Consistently Reviews Questions Of Federal Preemption In The Procedural Posture In Which This Case Arises

Respondent contends that review is inappropriate because this case arises as an interlocutory decision from a federal court of appeals. Kroske concedes, as she must, that 28 U.S.C. § 1254(1) provides this Court with jurisdiction and she ignores the fact that the Court consistently reviews questions of federal preemption in the precise posture in which the instant dispute arises. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503 (2006); *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995); *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246 (1994). Indeed, this Court's frequent review of lower court preemption decisions, all of which Kroske would claim are "interlocutory," demonstrates that a preemption question is *better* examined

prior to factual adjudication because it poses a predicate issue of law as to the validity of a state cause of action which, in the instant case, would result in a wholesale dismissal of the action and no trial proceeding.

C. Respondent's Argument On The Merits Is Wrong And Demonstrates The Need For Review To Uphold Federal Banking Preemption

1. Respondent's invocation of the State's historic police powers as a basis to defeat National Bank Act preemption (Opp. 19-22) underscores the need for this Court's intervention. As petitioner highlights in the second question presented, Pet. 25-27, the court of appeals erroneously applied a presumption against preemption despite the fact that the powers granted by Congress pursuant to Section 24 of the National Bank Act are "not normally limited by" state law, but rather "ordinarily pre-empt[] state law." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996). Section 24 (Fifth), enacted to preserve the safety and soundness of financial institutions, constitutes an "explicit[]" grant of power to national banks, which this Court has held "Congress would not want States to forbid, or impair * * * ." *Id.* at 33. Accordingly, it is irrelevant whether the state law explicitly preempted by the Section 24 power is enacted pursuant to historic police powers, because this Court has held that no presumption against preemption applies.

The Ninth Circuit's decision below applying a presumption in favor of state police powers over explicit grants of authority conferred by Congress pursuant to Section 24, thus threatens all banking powers granted under Section 24. That is because the Ninth Circuit focused upon the state law that was being preempted and the scope of state law in that field, rather than focusing on the national bank power that was being exercised, as required under *Barnett*.

2. Kroske's argument that state law is not preempted because it is necessary to the enforcement of the ADEA (Opp. 16-18) is not true. The ADEA is fully enforceable in States where state law does not provide a remedy for age discrimination, with employees exhausting administrative

remedies at the federal agency before filing suit for violation of the ADEA. 29 U.S.C. §§ 626(d), 633(b). Had Kroske brought an ADEA claim instead of choosing to rely on a state law claim alone, the fact that federal law preempts state law would not have limited her federal remedy.

Kroske's attempt to transform 29 U.S.C. § 633(a) into a savings clause is meritless because it merely states that the ADEA does not empower States to expand their jurisdiction where they previously had none. *See* Pet. 17 (analyzing *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 103 n.24 (1983)).

3. Further percolation in the lower courts will not resolve or clarify the issues here, which have been thoroughly vetted by the Third, Sixth, and Ninth Circuits, and the California Supreme Court. The petition is a clean vehicle which will not require the Court to become immersed in extraneous issues unrelated to a federal bank's dismissal "at pleasure" authority. Delay will only subject banks to uncertainty, divergent state law standards, and costly litigation on collateral issues, all of which Congress intended to avoid through preemption. Pet. 19-22.

CONCLUSION

For the reasons set forth above and in the petition for a writ of *certiorari*, the petition should be granted.

Respectfully submitted,

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IN THE
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October Term 2006

U.S. Bank National Association,

Petitioner,

v.

Kathy Kroske,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* THE CALIFORNIA BANKERS ASSOCIATION AND THE WASHINGTON BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred in holding, contrary to the Sixth Circuit and the California Supreme Court, that the National Bank Act's grant to national banks of the power to dismiss their officers "at pleasure," 12 U.S.C. § 24 (Fifth), fails to preempt a state employment discrimination law because a federal employment discrimination law enacted by Congress subsequent to the National Bank Act somehow makes state law applicable as well.

2. Whether the Ninth Circuit erred in holding, contrary to the Second and Sixth Circuits and this Court's precedents, that a presumption against preemption permits state laws to apply to national banks despite the longstanding preemptive force of the National Bank Act.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, the California Bankers Association ("CBA") and the Washington Bankers Association ("WBA"), are nonprofit professional associations established more than a century ago. Each represents most of the depository financial institutions in the State of California and the State of Washington, respectively.

A significant portion of these banks are national banks organized pursuant to the National Bank Act ("NBA"), 12 U.S.C. § 21 *et seq*. These member national banks range in size from large employers such as Bank of America, National Association and Wells Fargo Bank, N.A., each operating within and outside the Ninth Circuit, to far smaller national banks, such as Chino Commercial Bank, N.A., Coast National Bank, and Inland Community Bank N.A., each operating primarily within state borders.

Regardless of their size, as employers, the member national banks rely on the NBA's specific provision that permits national banks to dismiss officers "at pleasure." 12 U.S.C. § 24(Fifth). The Ninth Circuit's decision that the NBA's at-pleasure provision may be limited by state statutes is at odds with opinions of several other federal and state courts from other jurisdictions—including state courts within the Ninth Circuit itself—regarding the

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[1] By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief. This brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae*, their members, and their counsel.

scope of preemption. The result is that national banks have no definitive guidance as to what state laws, if any, apply to them and when. *Amici* therefore have a strong interest in the resolution of the preemption question raised by Petitioner.

SUMMARY OF ARGUMENT

Over a century ago, this Court recognized that the NBA sprang out of Congress's imperative to create a national banking system "with uniform operation" governed exclusively by federal law, free from state interference. *Talbott v. Bd. of Com'rs of Silver Bow County*, 139 U.S. 438 (1891). But now, national banks have no clear, much less definitive guidance as to what employment laws apply to them and when. The Ninth Circuit stands in direct conflict with the Fourth and Sixth Circuits on the question of whether state employment discrimination statutes are preempted by the NBA and similar federal bank acts. The Ninth Circuit ruling also further muddles confusion among the lower courts as to the scope of preemption when state employment laws are inconsistent with comparable federal laws.

Consequently, depending upon where a suit is filed, a national bank can be *always* subject to state law, *never* subject to it, or *sometimes* subject to it and *sometimes not*. And when the national bank is subject to state law, it may be subject to some provisions and not others. The answer in some states—like California—depends on whether the case is brought in the state courthouse or in the federal courthouse across the street. Where Congress wanted harmony, the lower courts have yielded cacophony. For this reason alone, *certiorari* should be granted to clarify once and for all what employment laws

apply to the banks organized under federal law, and how.

Resolution of these conflicts is of fundamental importance to the national banks. The 50 states, the District of Columbia, and federal territories all have enacted their own employment discrimination statutes, many with standards different from federal law and from each other. Subjecting national banks to these competing standards would undermine Congress's goal of ensuring national banks a uniform, federal standard and insulating them from state intrusion. Thus, in the hopes of restoring the uniform federal regulation that Congress intended—or at least providing national banks with certainty on what laws control—*amici* urge this Court to grant certiorari.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED BECAUSE FEDERAL AND STATE COURTS ARE SHARPLY DIVIDED ABOUT WHETHER AND HOW MUCH THE NATIONAL BANK ACT PREEMPTS STATE LAW.

This Court long ago recognized that the NBA sprang from Congress's imperative to create a national banking system "with uniform operation"—under federal law—free from a dizzying and potentially disruptive maze of state and local regulation. *Talbott v. Bd. of Com'rs of Silver Bow County*, 139 U.S. 438 (1891). Because national banks served such an important role in protecting the national economy and promoting a national currency—especially during the Civil War era, when the relevant provisions of the NBA were passed—Congress

made it a point to erect a wall insulating the national banks from hostile states bent on destroying them and ensuring that federal law alone would govern their most important functions. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10 (2003).

One of the protections Congress adopted to protect national banks from hostile state regulators, and subject them to a uniform regime of federal regulation, was the rule giving national banks complete discretion in dismissing officers free from intrusive state regulation. Congress authorized national banks "to appoint a president, vice president, cashier, and other officers, define their duties, . . . [and] dismiss such officers or any of them at pleasure, and appoint others to fill their places." 12 U.S.C. § 24(Fifth). Congress chose the same "at pleasure" dismissal language to achieve the same goals in the Federal Reserve Act ("FRA") and Federal Home Loan Bank Act ("FHLBA"), 12 U.S.C. § 341(Fifth) and 12 U.S.C. § 1432(a), which has led the courts to interpret these provisions coextensively, *see, e.g.*, *Mele v. Fed. Reserve Bank*, 359 F.3d 251, 255 (3d Cir. 2004); *Arrow v. Fed. Reserve Bank*, 358 F.3d 392, 394 (6th Cir. 2004); *Inglis v. Feinerman*, 701 F.2d 97, 98 (9th Cir. 1983), *cert. denied* 464 U.S. 1040 (1984).

To be sure, this at-pleasure provision—reposing in federal banks complete discretion in decisions about which employees were not fit to keep their jobs—served goals beyond uniformity and insulation from hostile states. Congress considered it important to grant federal banks the unfettered discretion to terminate officers at will "whenever the suspicion of faithlessness or negligence attaches to them" without fear of potential suit. *Westervelt v. Mohrenstecher*, 76 F. 118, 122 (8th Cir. 1896). Without that latitude, Congress feared, the

public's trust in federal banks would wane, and citizens would favor local, community banks over national banks. While Congress has since limited this discretion with the enactment of federal employment discrimination laws like Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, it has never wavered from the imperative of ensuring uniform dismissal standards under federal law for all national banks.

The lower courts have demolished any semblance of uniform federal standards. The courts of appeals are irreconcilably split over the most fundamental question of whether state employment discrimination laws can be directed against national banks at all. The lower courts are also confused about the scope of preemption where state law employment discrimination claims are inconsistent with federal standards. The result is contrary to Congress's intent in regards to national banks. National banks are distinct from other national employers because Congress has mandated that distinction by providing for a uniform regulatory system regarding the dismissal of officers. The chaos created by the current state of the law, however, now puts national banks in a worse position than other national employers, not knowing whether the patchwork of state and federal regulations will apply to their employees. This eviscerates the uniform system of exclusively federal regulation that Congress envisioned.

A. The Circuits Are Hopelessly Split As to Whether State Employment Discrimination Laws Are Entirely Preempted.

The split among the courts of appeals is direct and

irreconcilable. The result is not just differing preemption rules from one jurisdiction to the next, but, in some states, differing rules depending upon whether the case is litigated in state or federal court.

1. The Ninth Circuit's opinion is in direct conflict with opinions of the Fourth and Sixth Circuits.

A national bank facing a state law discrimination claim like Ms. Kroske's will receive diametrically opposite rulings depending upon where it is sued.

If the officer files the claim in a federal court within the Fourth or Sixth Circuit, or in a California state court, the claim will be dismissed. These courts have held that state employment discrimination laws purporting to regulate national banks necessarily conflict with congressional intent and are thus completely preempted. *Ana Leon T. v. Fed. Reserve Bank of Chi.*, 823 F.2d 928, 931 (6th Cir. 1987) (holding that Michigan's employment discrimination statute was preempted by the FRA); *Arrow v. Fed. Reserve Bank of St. Louis*, 358 F.3d 392, 393 (6th Cir. 2004) (affirming dismissal of Kentucky employment law claims because at pleasure provision of the FRA "applies to preempt state employment rights"); *Andrews v. Fed. Home Loan Bank of Atlanta*, 998 F.2d 214, 220 (4th Cir. 1993) (applying Sixth Circuit precedent in the analogous context of a wrongful termination dispute); *Peatros v. Bank of America NT&SA*, 990 P.2d 539, 559, 563 (Cal. 2000) (plurality holding that state statute entirely preempted by the NBA). As the Fourth Circuit put it: "Congress intended for federal law to define the discretion which the Bank may exercise in the discharge of employees. *Any* state claim for wrongful termination would plainly conflict

with the discretion afforded by Congress." *Andrews*, 998 F.2d at 220 (emphasis added).

If, however, the officer brings the claim in a federal court within the Ninth Circuit, or in certain other states, the claim will survive. The Ninth Circuit, joining other courts, has now held that the federal banking laws do not preempt state employment discrimination laws with regulatory and remedial schemes that are completely different from federal discrimination laws so long as they are substantively comparable to federal employment laws. *See, e.g.*, *White v. Fed. Reserve Bank*, 660 N.E.2d 493, 496 (Ohio Ct. App. 1995) (the dismissal-at-pleasure provision only creates an at-will employment agreement; since states may carve out exceptions to at-will employment, the FRA does not preempt state-created exceptions); *Moodie v. Fed. Reserve Bank of New York*, 831 F. Supp. 333, 337 (S.D.N.Y. 1993) (the at-pleasure provision of FRA does not mean that "Congress intended that section to exempt the Federal Reserve Banks, in the area of employment discrimination, from statutes or regulations of the states in which they operate, particularly when the state statutory scheme is consistent with federal legislation"); *Moodie v. Fed. Reserve Bank of New York*, 835 F. Supp. 751 (S.D.N.Y. 1993); *see also James v. Fed. Reserve Bank of New York*, No. 01-CV-1106(RJD)(VVP), 2005 WL 1889859, *7 (E.D.N.Y Aug. 8, 2005); *Katsiavelos v. Fed. Reserve Bank of Chicago*, No. 93 C 7724, 1995 WL 103308 (N.D. Ill. Mar. 3, 1995).

There is no way to reconcile these two lines of authority. No amount of percolation in the lower courts will resolve the conflict. The split will remain, and likely deepen, until this Court intervenes to resolve the conflict.

2. Outcomes can depend on whether a case is litigated in state or federal court.

To make matters worse, the same national bank can see different outcomes in the same discrimination claims based solely upon whether the claim is litigated in the state court or in a federal court next door.

If a bank officer brings a state law discrimination claim in federal court in California, the claim will survive, according to the Ninth Circuit. But if the same officer brings the same state law discrimination claim in California state court, the claim will not survive. The California Supreme Court has unanimously held that the NBA preempts California's employment discrimination statute to some degree, *Peatros v. Bank of America NT&SA*, 990 P.2d 539 (Cal. 2000), with a majority of the Court holding that the NBA preempts state law discrimination claims entirely. *Id.* at 563 (Brown, J., dissenting), 559 (Kennard, J., concurring).[2] The majority

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[2] Justice Brown's opinion was fashioned as a dissent because four of the other seven justices, for different reasons, held that summary judgment had been inappropriate, whereas Justice Brown would have upheld summary judgment. For this reason, the opinion by Justice Mosk is labeled the "lead opinion" in California because along with a concurrence by Justice Kennard, it formed the majority to overturn summary judgment. But Justice Brown's views on the scope of preemption represents the law of California, because it garnered four votes.

In her Brief in Opposition, Respondent erroneously asserts that *Peatros* is not precedential law in California because Justice Brown's decision is labeled as a dissent to the holding of the court. (Resp.'s Opp. Br. at 11-12.) Contrary to what she states, however, California courts, including the California Supreme Court, count opinions of justices who dissented in the result but concurred as to a

(footnote continued...)

reasoned that allowing states to impose their own substantive laws would frustrate Congress's vision of uniform federal standards. *Peatros*, 990 P.2d at 563 (Brown, J., dissenting).

An Ohio employment discrimination lawsuit presents the flip side of the same jurisdictional crapshoot. If the state discrimination claim is brought in state court, it will

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point of law to determine whether in any plurality decision there is a majority opinion as to a rule of law. *See, e.g., DeRonde v. Regents of Univ. of Cal.*, 625 P.2d 220, 223-24 (Cal. 1981), *cert. denied* 454 U.S. 832 (1981) (following rule of law laid down by four *dissenting* justices and one concurring justice of the U.S. Supreme Court in *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265 (1978)). Respondent also refers to several California cases that cite to Justice Mosk's lead opinion for support on issues of law. (Resp.'s Opp. Br. at 12-13 & n.3.) While she is correct that Justice Mosk's opinion is cited as persuasive authority in these cases, in each case the citation is to a rule of law unanimously agreed upon in *Peatros*. For instance, in *Nordyke v. King*, 44 P.3d 133, 138 (Cal. 2002), the California Supreme Court cited to Justice Mosk's opinion for the unremarkable proposition that partial preemption does not wholly invalidate a statute. Every Justice in *Peatros* agreed this was the law; the question in that case was not what effect partial preemption by the NBA would have, but whether NBA preemption was partial at all. Thus, *Nordyke* does not alter the precedential value of Justice Brown's and Justice Kennard's opinion in *Peatros*. Likewise, every other case cited by Respondent relies on Justice Mosk's opinion as properly stating the standard to determine if preemption exists. Again, the proper standard was something agreed upon by all justices in *Peatros*; the plurality resulted in the *application* of the standard to the state statute at issue. Suffice it to say that not one of the cases cited by Respondent follows Justice Mosk's specific opinion on whether the NBA partially preempts the FEHA as precedential. Under California law, Justice Mosk's opinion is not precedential on that particular question.

survive. *See White v. Fed. Reserve Bank*, 660 N.E. 2d at 496. But if the bank can remove it to federal court, the claim will be dismissed. *See Ana Leon T. v. Fed. Reserve Bank of Chi.*, 823 F.2d 928, 931 (6th Cir. 1987) (holding that Michigan's employment discrimination statute was preempted by the FRA); *Arrow*, 358 F.3d at 393 (same).

A national bank's susceptibility to a state law discrimination charge, then, can depend not just upon the state, and not just on whether the officer files the lawsuit in state or federal court, but on the fortuity of whether the bank is a citizen of the state in which the lawsuit is filed. The current law assures national banks about as much uniformity and certainty as a game of Russian roulette.

B. Even Courts that Agree that the National Bank Act Preempts State Law Discrimination Claims Are Split on the Scope of Preemption, with the Ninth Circuit Adding to the Confusion.

To say that the courts are split over *whether* the NBA preempts state employment discrimination laws barely scratches the surface of the conflict. Even among jurisdictions that hold that the NBA preempts state employment discrimination laws, the courts are hopelessly split as to the scope of the preemption.

Before the Ninth Circuit weighed in, there were already two conflicting camps. On one side is the view (adopted in California, as well as the Fourth and Sixth Circuits) that the NBA preempts state law completely. *Peatros*, 990 P.2d at 563 (Brown, J., dissenting). Any less robust form of preemption would burden the state courts and administrative agencies with a cumbersome preemption analysis of every procedural advantage or remedial device available. *Id.* at 563. This would be "a high price to pay for a cause of action that merely

duplicates remedies already available under Title VII and ADEA." *Id.*; *see Fasano v. Fed. Reserve Bank of New York*, No. 05-4661 (3d Cir. Aug. 3, 2006) (holding that FRA preempts state law provisions completely unless state statutes are exactly the same as federal counterparts) (approving *Evans v. Fed. Reserve Bank of Philadelphia*, No. Civ.A.03-4975, 2004 WL 1535772, at *6 (E.D. Pa. 2004) (endorsing "practical" preemption, but when a state statute has any provisions that expand either the rights *or remedies* permitted by federal law, the statute conflicts with federal law and must be preempted in its entirety; courts, particularly federal courts, should not be rewriting state statutes)).

On the other side is the view that the NBA preempts state employment discrimination statutes, but only "partially"—only to the extent that the remedial provisions are in synch. *Peatros*, 990 P.2d at 553 (Mosk, J.). Thus, by this view, state law claims for age and race discrimination should not be dismissed entirely because federal law, too, prohibits age and race discrimination. *Id.* at 552. But the remedies available under state law cannot exceed the federal remedies. *Id.* Thus, for example, the minority faction of the California Supreme Court held that federal law, which caps damages, preempts the state statute to the extent that it allows unlimited compensatory and punitive damages. *Id.*

Into this fray entered the Ninth Circuit with what appears to be yet a third approach. At first blush, the Ninth Circuit appears to hold that the NBA does not preempt the Washington Law Against Discrimination ("WLAD"), Wash. Rev. Code §§ 49.60.010-.400, at all, simply because both the WLAD and the ADEA prohibit termination of employees for being 40 or over. *Kroske v. U.S. Bank Corp.*, 432 F.3d 976, 988-89 (9th Cir. 2005),

as amended on denial of reh'g (Feb. 13, 2006). On closer inspection, however, it becomes apparent that the holding is more limited. Recognizing "Congress's intent to create a national banking system with 'uniform and universal operation through the entire territorial limits of the country,'" the Ninth Circuit hinted that it would preempt "state law prohibitions against discriminatory terminations that are *not* consistent with federal anti-discrimination laws." *Id.* at 989 (emphasis added) (quoting *Talbott v. Bd. of Com'rs of Silver Bow County,* 139 U.S. 438 (1891)). The key for the Ninth Circuit is whether the state statute "substantively mirrors a claim under the ADEA" or another federal anti-discrimination statute. *Id.* at 989.

The court does not explain what it means for a state claim to "substantively mirror" a federal one. Is it, as the quoted language suggests, only when the *grounds* for termination enumerated in the state statute are the same as those covered by federal law? In that case, perhaps an age discrimination claim would be preempted only when the comparable federal law provides no redress—as would be the case, for example, if state law would allow a 38-year-old to sue for age discrimination, contrary to the federal law that requires the employee to be 40 years old. Or does a state law "substantively mirror" federal law only to the extent that the remedies and procedures are the same? *Cf. Fasano v. Fed. Reserve Bank of New York*, No. 05-4661 (3d Cir. Aug. 3, 2006) (holding that state statutes that differ in remedies are preempted by FRA even when substantive protected categories may be the same). In that case, as we shall see, many attributes of the WLAD remedy would fail the test.

Whatever the answer in the Ninth Circuit, there is no disputing that even the courts that agree that the NBA

preempts state employment discrimination laws do not speak with one voice as to the scope of the preemption. And, again, the disagreements are unlikely to resolve themselves until this Court intervenes.

II. THE ISSUE IS IMPORTANT BECAUSE SUBSTANTIAL DIFFERENCES BETWEEN STATE AND FEDERAL EMPLOYMENT DISCRIMINATION STATUTES ABOUND, FRUSTRATING CONGRESS'S DESIRE FOR UNIFORM FEDERAL STANDARDS.

The conflicts among the lower courts have practical ramifications precisely because the differences between state and federal employment discrimination laws can be so substantial. We briefly review the types of differences that abound, and then explore how those differences affect the national banks.

A. State Employment Discrimination Law Differs from Federal Law in Numerous Ways.

Differences in Protected Categories. Several states extend discrimination law well beyond the reach of federal law. For example, unlike federal law, 21 states (including both Washington and California) prohibit termination because of marital status, and 16 (again including both Washington and California) prohibit discrimination on the basis of sexual orientation. Other states variously prohibit discrimination on the basis of familial status, Or. Rev. Stat. § 659A.309; Pa. Stat. Ann. tit. 43, § 953; place of birth, Vt. Stat. Ann. tit. 21 § 495; criminal record, 775 Ill. Comp. Stat. 5/7-103; Wis. Stat. § 111.321; public assistance, Minn. Stat. § 363A.08; N.D. Cent. Code, § 14-02.4-03; and political affiliation, D.C. Code § 2-1402.11. The District of Columbia goes

further, prohibiting termination based on personal appearance or, indeed, "any reason other than that of individual merit." D.C. Code § 2-1401.01.

Even within the categories otherwise protected by federal law, state and federal law differ in significant ways. For example, under the ADEA, only an employee who is 40 or older can claim age discrimination. Numerous states expand this category, either by allowing a plaintiff of any age to claim age discrimination or by allowing anyone from age 18 and up to do so (five states and D.C.).

Likewise, the federal Americans With Disabilities Act protects persons with disabilities from discrimination. Under this federal law, to be disabled, a plaintiff must prove he or she suffers from a condition that "substantially limits" a "major life activity." 42 U.S.C. § 12102(2)(A); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-83 (1999). Several states including California and Connecticut have enacted far broader definitions of who is "disabled" under state law, thereby increasing protections to persons not covered under federal law. Cal. Gov't Code § 12926.1(c); Conn. Gen. Stat. § 46a-60(a).

Differences in What Employers Are Covered. There are also differences in what employers are covered. Title VII applies only to employers of 15 or more employees; the ADEA applies only to employers of 20 or more. In contrast, 35 states and the District of Columbia apply their laws to employers of fewer than 15 employees.

Remedial Differences. Various states also offer remedial schemes that differ substantially from federal law. Title VII and other federal laws place strict limits on the nature and amount of compensatory and punitive

damages, including emotional distress damages, capping them at $300,000. 42 U.S.C. § 1981a(b)(3). The ADEA does not even allow for emotional distress damages, and replaces punitive damages with double the amount of economic damages if the plaintiff establishes willful misconduct. 29 U.S.C. § 626(b). In contrast, most states, including both Washington and California, allow limitless awards for emotional distress or punitive damages and have no double damages provisions. *See, e.g.,* Wash. Rev. Code § 49.60.030(f)(2); *Blaney v. Int'l Ass'n of Machinists and Aerospace Workers, Dist. No. 1*, 87 P.3d 757, 759, 762-63 (Wash. 2004) (WLAD provides for all actual damages incurred); *Commodore Home Sys., Inc. v. Superior Ct.*, 649 P.2d 912, 918 (Cal. 1982) (unlimited compensatory and punitive damages available under California law).

Different Defenses. The defenses available under federal statutes are not always available under state law. To take one example that seems especially salient in this case, federal law allows an employer to invoke a "mixed motive" defense, *see, e.g., Rachid v. Jack In the Box, Inc.*, 376 F.3d 305, 311 (5th Cir. 2004), which is unavailable under the WLAD, *see McKay v. Acorn Custom Cabinetry, Inc.*, 898 P.2d 284, 293-94 (Wash. 1995) (Madsen, J., dissenting) (noting WLAD does not recognize mixed motive cases). This defense applies to an employer who has taken a protected characteristic into account in its termination decision. The defense, if it applies, absolves the employer of liability if the employer establishes it would have made the same decision without regard to the impermissible consideration. *Desert Palace, Inc. v. Contra Costa*, 539 U.S. 90, 99 (2003).

Procedural Differences. There are also vast procedural differences between the federal and state

systems. For instance, many federal statutes, including Title VII, require administrative exhaustion before the employee files a suit. 42 U.S.C. § 2000e-5(f)(1). The reason for administrative exhaustion is that Congress has determined that a federal agency, the EEOC, has specialized ability to investigate and root out invidious practices. Five states, including Washington, do not require such exhaustion for claims. 12 states, including California, imbue the state agencies with more authority than Congress has given the EEOC, such as permitting them to award relief calculated to deter future violations, including attorneys fees' and costs, *e.g.*, Alaska Stat. § 18.80.130, or administrative fines, *e.g.*, N.H. Rev. Stat. Ann. § 354-A:21.

The statutes of limitations also vary between federal and state law. Title VII requires a plaintiff to file an administrative charge of discrimination within 180 days of the alleged misconduct and, after receiving a "right to sue" notice, the plaintiff has 90 days to file a civil complaint.[3] 42 U.S.C. §§ 2000e-5(c), 2000e-5(e)(1), 2000e-5(f)(1). The ADEA provides a two year statute of limitations for non-willful violations. In contrast, 15 states, including Washington and California, expand the deadlines to file administrative charges longer than 180 days and give employees more time to file civil actions. Cal. Gov't Code §§ 12960(b), 12965(d) (in California, employees have a year after a right to sue issues to file a civil complaint); Wash. Admin. Code § 162-08-071(5);

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[3] This 180 days to file an initial charge is expanded to 300 days if a state does not have a deferral agency. 42 U.S.C. § 2000e-5(e)(1). Currently, all but four states have deferral agencies.

Martini v. Boeing Co., 945 P.2d 248 (Wash. App. 1997), *aff'd* 971 P.2d 45 (Wash. 1999) (three year statute of limitations applies to actions under WLAD).

Moreover, states differ from federal law as to what act begins the running of the statute of limitations. Under federal law, notice of a pending termination is sufficient to begin the time period to file suit. California, by contrast, does not start the clock until the actual employment action takes place. *Romano v. Rockwell Int'l, Inc.*, 926 P.2d 1114, 1127 (Cal. 1996).

Differences in Individual Liability. Finally, federal law and state law may differ in terms of the liability borne by individual managers who make termination decisions. Title VII and the other federal laws do not permit individual liability for termination decisions. *See Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583 (9th Cir. 1993), *cert. denied by Miller v. La Rosa*, 510 U.S. 1109 (1994), *reh'g denied* 511 U.S. 1048 (1994). In contrast, at least four states, including Washington and California, authorize individual liability, thus subjecting bank managers to liability for their decisions to terminate bank officers. *See Brown v. Scott Paper Worldwide Co.*, 20 P.3d 921, 926 (Wash. 2001); *Walrath v. Sprinkel*, 121 Cal. Rptr. 2d 806 (Cal. Ct. App. 2002) (supervisors personally liable for retaliation under California statute); *Winarto v. Toshiba Am. Elecs. Components*, Inc., 274 F.3d 1276, 1288 (9th Cir. 2001) (same).[4]

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[4] *See also Iacampo v. Hasbro, Inc.*, 929 F. Supp. 562 (D.R.I. 1996); *St. Peter v. Ampack-Division of Gatewood Prods., Inc.*, 484 S.E.2d 481 (W. Va. 1997); *Vivian v. Madison*, 601 N.W.2d 872 (Iowa 1999).

B. The Numerous Distinctions, and the Uncertainty Surrounding Preemption, Undermine Congress's Goals.

Congress wanted national banks to be subject to uniform federal standards not for aesthetic reasons, but for practical ones. To ensure public trust in nationally chartered banks, national banks had to have the latitude to make quick, decisive employment decisions, and to make these decisions consistently regardless of where the particular officer happens to sit.

When national banks are subject to competing or unclear standards, this goal cannot be achieved. Employers do not decide whether to terminate an officer in a vacuum. Even armed with a strong business justification for the termination, a prudent employer evaluates whether the decision carries with it the danger of a lawsuit, what the potential liability could be, and what procedural advantages and disadvantages it will face in eventual litigation. Differences in substantive rights, remedies, and procedures affect the calculus profoundly, as does uncertainty as to which body of law governs the decision and any dispute that follows in its wake.

For example, a national bank deciding whether to fire a poor-performing officer for perfectly valid business reasons might reach different conclusions depending upon whether the officer could avail himself of a cause of action under state law that would not exist under federal law. Similarly, a bank manager may respond differently to a bank officer's misconduct depending upon whether the manager faces personal liability for a termination.

In each situation, the bank's response might be precisely the opposite of what Congress intended under

Section 24(Fifth), erring on the side of retaining the officer, rather than exercising the power granted by Congress to take appropriate employment action.

The calculus is equally affected by the damages differential. A bank deciding whether to fire an officer of questionable ethics might well reach different conclusions depending upon whether the termination could expose the bank to limitless punitive damages. The institutional response, again, could be to be to retain officers rather than—as Congress intended—"immediate removal whenever the suspicion of faithlessness or negligence attaches to" an officer. *Westervelt v. Mohrenstecher*, 76 F. 118, 122 (8th Cir. 1896).

In short, a national bank's response to the same exact situation will differ significantly based solely on where the bank officer is located. That is exactly the opposite result intended by Congress. The Ninth Circuit's decision confuses and confounds these issues. The open question of NBA preemption thus has practical effects warranting review by this Court.

CONCLUSION

This Court should grant the Petition for Writ of *Certiorari*.

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IN THE

Supreme Court of the United States

U.S. BANK NATIONAL ASSOCIATION,

Petitioner,

—v.—

KATHY KROSKE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE CLEARING HOUSE ASSOCIATION L.L.C. AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

The Clearing House Association L.L.C. has no corporate parents, and does not issue stock.

The Clearing House Association L.L.C. (the "Clearing House") respectfully submits this brief as *amicus curiae* in support of Petitioner U.S. Bank, N.A. ("U.S. Bank")'s petition for a writ of *certiorari* for review of the opinion of the United States Court of Appeals for the Ninth Circuit reported at 432 F.3d 976 (9th Cir. 2005).[1]

STATEMENT OF INTEREST OF AMICUS CURIAE

The Clearing House is an association of leading commercial banks, including eight national banks organized under the National Bank Act, 12 U.S.C. § 21 *et seq.* (the "Act").[2] The Clearing House is dedicated to protecting the rights and interests of its members, as well as advancing the interests of the commercial banking industry. The Clearing House frequently presents the views of its members on important public policy issues affecting the commercial banking industry by, among other things, appearing as *amicus curiae* in cases raising significant questions of law relating to banking.

The Clearing House submits this *amicus curiae* brief in support of U.S. Bank's petition because the Court of Appeals' decision, if allowed to stand, would replace national banks' historic right to dismiss bank officers "at pleasure" with numerous, complex and conflicting regimes of state employment law and, more broadly, infringe upon the system of uniform bank regulation established by Congress and repeatedly confirmed by this Court.

In relevant part, Section 24 (Fifth) of the Act grants a national bank the "power" to, "by its board of directors, . . . appoint a president, vice president, cashier, and other officers, [and] . . . *dismiss such officers or any of them at pleasure*." 12 U.S.C. § 24

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[1] This brief is filed with the written consent of the parties. No counsel for a party authored any portion of this brief, nor did any person or entity other than the Clearing House make any monetary contribution to the preparation or submission of this brief.

[2] Petitioner U.S. Bank, N.A. is a member of the Clearing House, as are Bank of America, N.A., The Bank of New York, Citibank, N.A., Deutsche Bank Trust Company Americas, HSBC Bank USA, N.A., JPMorgan Chase Bank, N.A., LaSalle Bank, N.A., UBS AG, Wachovia Bank, N.A., and Wells Fargo Bank, N.A.

(Fifth) (emphasis added). Notwithstanding this clear language, the Court of Appeals held that Section 24 (Fifth) can be superseded by Respondent's age discrimination claim under the Washington Law Against Discrimination, WASH. REV. CODE §§ 49.60.010 *et seq.* ("WLAD").

The Court of Appeals' holding will create confusion and uncertainty, as well as multiply the litigation costs for the Clearing House's national bank members by subjecting them to multiple states' wrongful termination laws. Given the multi-state operations of many national banks, the risk that the Court of Appeals' decision will require national banks to comply with and litigate under multiple regimes of state employment law is substantial. Six of the national bank members of *amicus curiae* have branches in from nine to 30 states, and there are at least 164 national banks with branches in multiple states.[3]

Indeed, at least two Clearing House national bank members, Bank of America, N.A. and U.S. Bank, N.A., have branches in states within the jurisdiction of both the Sixth Circuit and the Ninth Circuit. Because of the split of authority now existing between those two Circuits, *compare* the decision of the Court of Appeals *with, e.g., Arrow* v. *Fed. Reserve Bank of St. Louis*, 358 F.3d 392 (6th Cir. 2004), absent review by this Court, the application of Section 24 (Fifth) will differ depending on whether the branch involved is in the Ninth Circuit or the Sixth Circuit. This Court, which long has recognized the need for uniform rules for national banks, *Beneficial Nat'l. Bank* v. *Anderson*, 539 U.S. 1, 10 (2003), should resolve this clear disagreement among the Courts of Appeals.

The Court of Appeals' decision also undermines national banks' ability to dismiss officers who are underperforming or dishonest, or simply to make the banks more efficient, and thereby threatens Section 24 (Fifth)'s long-recognized purpose of ensuring the effective and efficient operation and integrity of the national banking system.

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[3] *See* FDIC Institutional Directory, *http://www2.fdic.gov/idasp/main.asp* (last visited Jul. 5, 2006).

At an even more fundamental level, the Clearing House is deeply concerned by the preemption analysis employed by the Court of Appeals. The Clearing House's national bank members have a strong interest in ensuring that the courts give effect to Congress' intent to create a uniform system of national bank regulation in applying the Act, and the Clearing House believes the Court of Appeals failed to do so here.

The Court of Appeals premised its holding that Section 24 (Fifth) does not preempt the WLAD on its views that (1) the Age Discrimination in Employment Act, 29 U.S.C. §§ 623 *et seq.* ("ADEA"), implicitly repealed national banks' power to dismiss officers "at pleasure" under Section 24 (Fifth) with respect to claims of termination based on age,[4] and (2) the prohibition of age discrimination in the WLAD "substantively mirrors" the ADEA. However, even assuming the ADEA did work a partial implied repeal of Section 24 (Fifth), to the extent there is a conflict between the two, it does not follow that Section 24 (Fifth) no longer preempts the WLAD simply because the WLAD resembles the ADEA. In *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984), this Court squarely rejected the argument that Congress' implied partial repeal of a *federal* statute indicates an intent not to preempt *state* law.

The Court of Appeals further erred by presuming that Section 24 (Fifth) does not preempt the WLAD absent a clear expression of contrary Congressional intent. In fact, the very reverse is true. Section 24 (Fifth)'s plain language and Congress' purposes in adopting the Act required the Court of Appeals to presume that Section 24 (Fifth) *does* preempt the WLAD absent a clear Congressional statement to the contrary. Under this Court's jurisprudence, Section 24 (Fifth)'s grant of the broad power to dismiss officers at pleasure, the absence of a state-law savings clause in Section 24 (Fifth) and the presence of such clauses elsewhere in the Act, and Congress' long-recognized intent to protect national

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[4] Although the Court of Appeals described its perception of the federal law's status as "implicit repeal," this is incorrect. Even assuming the ADEA does supersede or create an exception to Section 24 (Fifth) of the Act in this limited area, that section remains in full force and effect except to the extent it contravenes another federal law (the ADEA).

banks from state interference compel the conclusion that Section 24 (Fifth) preempts the WLAD.

Finally, the Court of Appeals' cited authority in support of its presumption of non-preemption is inapposite. The Court of Appeals incorrectly relied on this Court's precedent applying ERISA's savings clause, even though Section 24 (Fifth) contains no such clause. Moreover, the Court of Appeals' reliance on the states' allegedly traditional occupation of the area of age discrimination law was misplaced. The proper question is not whether the states have historically regulated age discrimination, but whether they have traditionally regulated national banks' employment practices, and even the Court of Appeals recognized that the states have not done so.

STATEMENT OF THE CASE

Petitioner U.S. Bank's Board of Directors elected Respondent Kathy Kroske as an assistant vice president and an "officer" within the meaning of Section 24 (Fifth). Respondent served as a branch manager in one of Petitioner's offices. Following warnings about performance, Petitioner subsequently terminated Respondent's employment for underperformance. Respondent was fifty-one years old at the time of her termination.

Respondent sued Petitioner in Washington state court, claiming that Petitioner terminated her based on her age in violation of the WLAD. Petitioner removed the action to federal court and later moved for summary judgment on the ground that Respondent's WLAD claim was preempted by Section 24 (Fifth). The District Court granted Petitioner's motion, and Respondent appealed to the United States Court of Appeals for the Ninth Circuit.

The Court of Appeals reversed, holding that Section 24 (Fifth) does not preempt the WLAD. The Court of Appeals began by relying on a chronological approach to resolving the potentially conflicting federal statutes. The Court of Appeals reasoned that, because the ADEA was enacted later than the Act, the ADEA's prohibition of age discrimination and national banks' power to dismiss officers "at pleasure" must be reconciled in favor of the

later-enacted statute. *Kroske*, 432 F.3d at 987. The Court of Appeals then used this resolution of the conflict between two federal statutes to resolve the conflict between the first of the two federal statutes and state legislation. The Court of Appeals found that because the WLAD's prohibition of age discrimination "mirrors the substantive provisions of the ADEA," "[i]t follows that the provision of the WLAD prohibiting age discrimination does not conflict with the at-pleasure provision of the National Bank Act." *Id.*

Accordingly, in the Court of Appeals' view, Section 24 (Fifth) does not preempt the WLAD "in the absence of clear congressional intention to the contrary." *Id.* The Court of Appeals sought to buttress its conclusion by the assertion that the WLAD was enacted "pursuant to the State's historic police powers." *Id.* at 988.

SUMMARY OF ARGUMENT

First, even assuming the Court of Appeals were correct that the ADEA implicitly repealed Section 24 (Fifth), it does not follow that Section 24 (Fifth)'s preemption of the WLAD is invalidated because the WLAD resembles the ADEA. *Second*, the Court of Appeals erred in presuming that Section 24 (Fifth) does not preempt the WLAD absent a clear Congressional statement. Section 24 (Fifth)'s plain language, Congress' often-recognized goal of uniform national bank regulation, and Congress' traditional regulation of national banks' activities actually require a presumption of preemption in this case. *Third*, the Court of Appeals' decision runs counter to Congress' goals in enacting the Act, *i.e.*, protecting national banks from state interference, subjecting them to uniform rules, and preserving the integrity of, and public trust in, the national banking system.

The impact of this erroneous ruling on the uniform regulation of national banks itself fully justifies review by this Court. A separate and sufficient reason for review is that, as noted in U.S. Bank's petition, the Court of Appeals' ruling directly conflicts with other appellate decisions holding that Section 24 (Fifth), and analogous provisions in the Federal Reserve Act, 12 U.S.C. §§ 221 *et seq.*, and the Federal Home Loan Bank Act, 12 U.S.C.

§ 1432(a), preempted state-law employment discrimination claims. *See Katsiavelos* v. *Fed. Reserve Bank of Chicago*, No. 93 C 7724, 1995 U.S. Dist. LEXIS 2603, *7-8 (N.D. Ill. Mar. 3, 1995) ("at pleasure" dismissal language in Federal Reserve Act "is patterned on similar provisions of the National Bank Act") (citing H.R. 69, 63rd Cong. (1st Sess. 1913)).

ARGUMENT

I. EVEN IF THE ADEA IMPLICITLY REPEALED SECTION 24 (FIFTH), IT DOES NOT "FOLLOW" THAT SECTION 24 (FIFTH) RELINQUISHES ITS PREEMPTION OF THE WLAD.

A. This Court Has Specifically Rejected the Argument that the Implied Repeal of One Federal Statute by Another Also Precludes the Preemption of State Law.

The Court of Appeals held that because the ADEA repeals Section 24 (Fifth) by implication to the extent necessary to give effect to the ADEA, "[i]t follows that the provision of the WLAD prohibiting age discrimination does not conflict with the at-pleasure provision of the National Bank Act." *Kroske* v. *US Bank Corp.*, 432 F.3d 976, 987 (2005). However, even assuming that one federal law overrides an earlier federal law, it in no way "follows" that the earlier federal law (Section 24 (Fifth)) is thereby also deprived of its preemptive authority over state law (the WLAD). This Court rejected an identical theory in *Southland Corp.* v. *Keating*, 465 U.S. 1 (1984) ("Southland").

In *Southland*, the Court reviewed a California Supreme Court decision holding that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, did not preempt a California statute prohibiting arbitration of claims under the California Franchise Investment Law. *Id.* at 5. The California Supreme Court reasoned that because the statute at issue was modeled on Section 14 of the Securities Act of 1933, 15 U.S.C. § 77n—which, per this Court's decision in *Wilko* v. *Swan*, 346 U.S. 427 (1953), prohibited arbitration of claims under the Securities Act—the FAA could not preempt the California statute. *Keating* v. *Superior Court*, 31 Cal. 3d 584, 600-04, 645 P.2d 1192, 1200-04 (Cal. 1982).

This Court rejected the California Supreme Court's analysis and held that the FAA preempted the California statute, noting that "[t]he question in *Wilko* was not whether a state legislature could create an exception to § 2 of the Arbitration Act, but rather whether Congress, in subsequently enacting the Securities Act, had in fact created such an exception." *Southland*, 465 U.S. at 16 n.11.

Accordingly, in *Southland*, it did not follow from Congress' creation of an exception to the FAA through the Securities Act that the FAA no longer preempted *state law* modeled after the Securities Act. Similarly, here, even if Congress did implicitly repeal Section 24 (Fifth) via the ADEA, state law conflicting with Section 24 (Fifth), whether or not resembling federal law, remains preempted. *See also United States* v. *Locke*, 529 U.S. 89, 115 (2000) (rejecting state's argument that "its [oil tanker regulations are] not pre-empted because [they are] similar to federal requirements"); *Peatros* v. *Bank of Am.*, 22 Cal. 4th 147, 182, 187, 990 P.2d 539, 559, 562 (Cal. 2000) ("amendment or repeal of one federal statute by another should not be read as an invitation to append analogous state laws to the national scheme") (majority agreeing that Section 24 (Fifth) preempts California age discrimination statute).

As discussed further below, the key issue for preemption purposes is not whether the WLAD's language resembles the ADEA, but rather whether Congress has clearly expressed an intent that the National Bank Act not preempt state age discrimination law. Congress has expressed no such intent.

B. The Court of Appeals Failed to Follow the Principle that One Federal Statute Should Be Construed to Implicitly Repeal Another Only to the Minimum Extent Possible.

The Court of Appeals gave lip service to the principle that, even if two statutes are in conflict, implied repeal is to be found only to the minimum extent necessary, 432 F.2d at 987, citing *Kee Leasing Co.* v. *McGahan (In re Glacier Bay)*, 944 F.2d 577, 582 (9th Cir. 1991) (quoting *Silver* v. *N.Y. Stock Exch.*, 373 U.S. 341, 357 (1963)). In actuality, however, it ignored that rule in concluding that the implied repeal of Section 24 (Fifth) by the

ADEA meant that the Act's preemptive rule also was repealed as to state law.

"Repeal is to be regarded as implied only if necessary to make the [repealing statute] work, and even then only to the minimum extent necessary." *Silver*, 373 U.S. at 357. To make the ADEA "work," the Court of Appeals only needed to resolve any inconsistency between federal statutes and hold that national banks are subject to the ADEA's prohibition of age discrimination. It did not need to extend that holding to provide that Section 24 (Fifth) has been repealed and does not preempt state age discrimination law. Indeed, as U.S. Bank observes, the ADEA's statutory scheme not only can operate without state age discrimination law, but action by the EEOC pursuant to the ADEA supersedes any action by a state antidiscrimination agency. (Cert. Pet. at 25 (citing 29 U.S.C. § 633(a).)

Even when deciding whether Congress intended, by enacting a federal statute, to implicitly repeal a provision of the National Bank Act, this Court focused on Congress' intent to ensure the efficient operation of national banks. In *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 158 (1976), the Court held that Section 27 of the Securities Exchange Act ("Exchange Act"), 15 U.S.C. § 78aa, which allows a suit under the Exchange Act, *inter alia*, in any district where a violation occurred, did not impliedly repeal Section 94 of the Act, which provided that a national bank could only be sued in the district where it was established. The Court observed that Section 94 was intended "for the convenience of [national banking] institutions, and to prevent interruption in their business that might result from their books being sent to distant counties . . . ." *Id.* at 156 (quoting *Charlotte Nat'l. Bank* v. *Morgan*, 132 U.S. 141, 145 (1889)). Section 94's purposes, the Court held, could be harmonized with those of the Exchange Act by permitting suits against national banks under the Exchange Act but allowing those suits only where the banks were established. *Id.* at 155-57; *see also Gen'l. Elec. Credit Corp.* v. *James Talcott, Inc.*, 271 F. Supp. 699, 707 n.9 (S.D.N.Y. 1966) (reaching same conclusion because national "banks are quasi-public institutions, . . . are subject to the control of Congress, and are not to be interfered with by state legislative or

judicial action . . . .") (quoting *Van Reed* v. *People's Nat'l. Bank of Lebanon*, 198 U.S. 554, 557 (1905)).

Similarly, the purposes of Section 24 (Fifth) and the ADEA can be effectively harmonized by permitting age discrimination suits by officers against national banks under federal law but prohibiting such suits under state law. If national banks are subject to the ADEA and not its state-law counterparts, they will be subject to a regime of antidiscrimination law but, consistent with the basic purpose of the Act, it will be a single uniform regime. Because, however, as described below, there are significant differences between the ADEA and many state age discrimination statutes (*see* Part III.B *infra*), requiring national banks to comply with multiple state age discrimination laws will be costly and disruptive to their operations (*see* Part III.A *infra*).

II. THE COURT OF APPEALS ERRONEOUSLY PRESUMED THAT THE NATIONAL BANK ACT CANNOT PREEMPT THE WLAD ABSENT A CLEAR CONGRESSIONAL STATEMENT, WHEN IN FACT A PRESUMPTION OF PREEMPTION WAS REQUIRED.

The Court of Appeals "[began] with the presumption that Congress did not intend the National Bank Act to preempt the WLAD," 432 F.3d at 981, and held that Section 24 (Fifth) does not preempt the WLAD "in the absence of clear congressional intent to the contrary." *Id.* at 987. This approach and this conclusion are totally wrong. The Act's clear, unambiguous language and this Court's precedents required the Court of Appeals to presume that the Act *does* preempt state law absent a clear contrary statement by Congress.

The Court of Appeals recognized that national banking law ordinarily preempts contrary state law, 432 F.3d at 982, citing *Barnett Bank of Marion County, N.A.* v. *Nelson*, 517 U.S. 25, 32 (1996), and that a presumption of preemption applies when a state regulates an area where there has been a significant federal presence, 432 F.3d at 981, citing *Locke*, 529 U.S. at 108. The court also recognized that there has been a significant federal presence in the regulation of national banks, which supports a presumption of preemption, but then reversed that presumption because the states had "historic police powers to prevent dis-

crimination on specified grounds." 432 F.3d at 981. That turns the analysis on its head. A finding of preemption depends on the existence of Congressional intent and a significant federal presence which, if they exist, are not overridden by the origins of the preempted state statute. In *Barnett Bank* itself, this Court rejected the very argument that traditional state regulation of insurance sales insulated from preemption a Florida regulation prohibiting sales of insurance by national banks. 517 U.S. at 43.

A. The Act's Plain Language Mandates a Presumption that It Preempts Conflicting State Law Absent a Contrary Congressional Statement.

Section 24 states, in relevant part, that a national bank "shall have *power* to . . . dismiss . . . officers or any of them at *pleasure* . . . ." 12 U.S.C. § 24 (Fifth) (emphasis added). There is no limitation on this power; indeed, the phase "at pleasure" demonstrates the unfettered breadth of authority conferred. The statute's grant of the "power" of dismissal at pleasure establishes a presumption that national banks may exercise that power unrestricted by state law. *See Barnett Bank*, 517 U.S. at 32 (Court "interpret[s] grants of . . . both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law").

Section 24 of the Act contains no language subjecting to state law national banks' power to dismiss employees at pleasure. *See* 12 U.S.C. § 24. However, Congress did insert state-law savings clauses elsewhere in the Act. *See* 12 U.S.C. § 36(c) ("A national banking association may . . . establish and operate new branches . . . if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question . . . ."); 12 U.S.C. § 85 ("Any association may . . . charge . . . interest at the rate allowed by the laws of the State . . . ."); 12 U.S.C. § 90 ("Any national banking association may . . . give security for the safekeeping and prompt payment of the funds so deposited to the same extent . . . as is authorized by the law of the State in which such association is located . . . ."); 12 U.S.C. § 92a(a) ("Comptroller of the Currency . . . may grant . . . national banks applying therefor, when not in contravention

of State or local law, the right to act as trustee . . . ."); *see also Barnett Bank*, 517 U.S. at 34.

Congress' decision not to include a state-law savings clause in Section 24 (Fifth), while it did so elsewhere, confirms that Congress did not intend to allow state law to affect national banks' statutory power to dismiss officers at pleasure. *See Franklin Nat'l. Bank* v. *New York*, 347 U.S. 373, 378 (1954) ("We find no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances."); *see also Fid. Fed. Sav. & Loan Ass'n.* v. *De La Cuesta*, 458 U.S. 141, 163 (1982) (Federal Home Loan Bank Act preempted state law in the absence of savings clause because "if federal savings and loans were expected to conform to state law except where explicitly pre-empted in the Act itself, the provisions incorporating specific aspects of state law were needlessly repetitive").

Because Section 24 has no language subjecting national banks' power to dismiss employees at pleasure to state restriction, Section 24 preempts Respondent's claims under the WLAD. *See Barnett Bank*, 517 U.S. at 34-35 (because the Act "explicitly grants a national bank an authorization, permission or power" to sell insurance under 12 U.S.C. § 92, and it "contains no 'indication' that Congress intended to subject that power to local restriction," the Act preempted contrary state law).

B. Congress' Objective of Uniform National Bank Regulation Requires a Presumption of Preemption.

This Court has repeatedly noted that Congress' objective of uniform national bank regulation and the comprehensiveness of the Act's scheme regarding national banks' operations weigh strongly in favor of the Act's preemption of conflicting state statutes. *See Beneficial Nat'l. Bank*, 539 U.S. at 10-11 (need for "[u]niform rules limiting the liability of national banks. . . . supports the established interpretation of §§ 85 and 86 [of the Act] that gives those provisions the requisite pre-emptive force to provide removal jurisdiction"); *Marquette Nat'l. Bank* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15, 318 (1978) (because "the National Bank Act. . . [was] intended to facilitate . . . a 'national banking system.' . . . . [w]e would certainly be

exceedingly reluctant to read . . . a hiatus into the [Act] in the absence of evidence of specific congressional intent"); *Farmers' & Mechanics' Nat'l. Bank* v. *Dearing*, 91 U.S. 29, 33-34 (1875) ("National banks . . . are instruments designed to be used to aid the government in the administration of an important branch of the public service. . . . [and thus] the States can exercise no control over them . . . except in so far as Congress may see proper to permit.").

The Court of Appeals should have presumed that Section 24 (Fifth) preempts the WLAD based on this Court's repeated affirmations of Section 24's preemptive force.

C. The Court of Appeals' Authority for its Presumption of Non-Preemption Is Inapposite.

1. *Shaw* v. *Delta Airlines* is inapposite because it relied on ERISA's anti-preemption savings clause and Section 24 (Fifth) has no such language.

The Court of Appeals relied on *Shaw* v. *Delta Airlines, Inc.*, 463 U.S. 85 (1983), for its assumption that the Act cannot preempt the WLAD absent a clear legislative statement, but *Shaw* is inapposite. In *Shaw*, the Court held that the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, did not completely preempt a state antidiscrimination statute, but it did so on the basis of a specific anti-preemption provision. Section 514(d) provides that ERISA "shall not 'be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States.' " *Shaw*, 463 U.S. at 101 (citing 29 U.S.C. § 1144(d)). The Court found this language sufficient to protect, in part, state law against preemption because "[s]tate laws" such as the state antidiscrimination law at issue "play a significant role in the enforcement of Title VII," and thus complete preemption would effectively "modify" or "impair" Title VII. *Id.* at 102.

Contrary, then, to the Court of Appeals' finding, *Shaw* has no application to this case because Section 24 (Fifth) contains no anti-preemption clause. Indeed the absence of such a clause confirms Congress' preemptive intent. In holding that Section 92 of the National Bank Act preempted state law, *Barnett Bank* specif-

ically distinguished cases concerning statutes "that accompany a grant of an explicit power with an explicit statement that the exercise of that power is subject to state law." *Barnett Bank*, 517 U.S. at 34.

2. National bank regulation is not an area "traditionally occupied by the states."

The Court of Appeals further relied on this Court's statement in *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), that where "Congress legislate[s] . . . in a field which the States have traditionally occupied, ... we have worked on the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress." The Court of Appeals acknowledged that this "assumption" does not apply if the relevant "field" for preemption purposes is the regulation of national banks, as "Congress has legislated in the field of banking from the days of *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 . . . (1819), creating an extensive federal statutory and regulatory scheme." *Kroske*, 432 F.2d at 982 (quoting *Bank of Am.* v. *City & County of S.F.*, 309 F.3d 551, 559 (9th Cir. 2002)). Without any supporting authority, however, the Court of Appeals assumed that the relevant field was not regulation of national banks, but of age discrimination.

The Court of Appeals' assumption is erroneous; the question here relates to the authority of national banks in an essential aspect of their operations. Indeed, when deciding whether the Act preempts a state law, this Court has framed the inquiry as whether the state may regulate national banks' operations—not whether the state may generally regulate the type of conduct the statute concerns. *See Beneficial Nat'l. Bank*, 539 U.S. at 11 (issue in deciding whether Act preempted general state usury statute was whether there can be a "state-law claim of usury against a national bank"); *First Nat'l. Bank of San Jose* v. *Cal.*, 262 U.S. 366, 369 (1923) (issue in deciding whether Act preempted statute generally providing for escheat of bank deposits was whether state "may . . . dissolve contracts of deposit even after twenty years and require national banks to pay to it the amounts then due").

III. THE COURT OF APPEALS' DECISION FRUSTRATES CONGRESS' GOALS OF UNIFORM REGULATION AND ASSURING THE INTEGRITY OF THE NATIONAL BANKING SYSTEM.

A. The Court of Appeals' Decision Conflicts with this Court's Precedents Recognizing the Importance of Uniform National Bank Regulation.

Because it held that Section 24 (Fifth) does not preempt state age discrimination law, the Court of Appeals' decision threatens to subject national banks to multiple and potentially inconsistent regimes of state employment regulation.[5] The uncertainty and litigation costs that will result from the Court of Appeals' decision will impair national banks' ability efficiently to perform their duties.

This Court long has recognized that a key purpose behind the National Bank Act was to assure that national banks are subjected to a uniform system of regulation. *See Beneficial Nat'l. Bank*, 539 U.S. at 10 (National Bank Act preempted state usury law because "[u]niform rules limiting the liability of national banks . . . are an integral part of a banking system that needed protection from 'possible unfriendly State legislation' "); *First Nat'l. Bank*, 262 U.S. at 370 (conflicting state regulations regarding escheat of funds in accounts at national banks "seem incompatible with [Congress'] purpose to establish a system of governmental agencies specifically empowered and expected freely to accept deposits from customers irrespective of domicile . . . ."); *Easton* v. *Iowa*, 188 U.S. 220, 229 (1903) (Act creates "a system . . . independent, so far as powers conferred are concerned, of state legislation which . . . might impose limitations and restrictions as various and as numerous as the States"). This

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[5] As the District Court noted below,

> "Even assuming that Title VII and ADEA are not preempted by the National Bank Act, those federal remedies cannot open the window to state legislation. To append consistent state regulation to Title VII and ADEA would repeal the National Bank Act's uniform scheme of federal legislation and subject national banking associations to the vagaries of over 50 unique employment approaches." (Cert. Pet. at 60a.)

Court should grant *certiorari* to ensure that Congress' intent in this regard is fulfilled.

B. The Court of Appeals' "Substantively Mirrors" Approach Does Not Diminish the Threat to Uniform National Bank Regulation Created by its Holding.

The Court of Appeals attempted to justify its non-preemption holding on the basis that, because Respondent's "age discrimination claim under the WLAD . . . substantively mirrors a claim under the ADEA," holding that Section 24 (Fifth) does not preempt Respondent's WLAD claim would not disrupt Congress' scheme of uniform national banking regulation. *Kroske*, 432 F.3d at 989. The Court of Appeals' "substantively mirrors" standard, however, is inherently vague and likely to generate the very litigation costs and uncertainty, and threat to national banks, that Congress intended to prevent through the Act. Not only would the "substantively mirrors" standard create confusion and uncertainty, it is illogical. If a state statute does not meet the standard (however defined), there is an obvious need for preemption. If it does meet the test, there is no need to override the general principle of preemption.

Although both the ADEA and the WLAD cover the same general subject, there are material differences between them. For example, unlike the ADEA, the WLAD allows emotional distress damages and does not require administrative exhaustion prior to suit. (Cert. Pet. at 19-20.) In *Fasano* v. *Fed. Reserve Bank of N.Y.*, No. 05-4661, ___ F.3d ___ (3d Cir. Aug. 3, 2006) (slip op. at 29), the Court held that 12 U.S.C. § 341 (Fifth) preempts state employment law that, unlike the ADEA, permits individual damage liability and does not require exhaustion of administrative remedies. Moreover, courts interpreting the WLAD are not bound by federal precedent. *See Hill* v. *BCTI Income Fund-I*, 144 Wn.2d 172, 180, 22 P.3d 440, 446 (Wash. 2001) "[W]hile federal employment law rulings represent 'a source of guidance, . . . we are free to adopt those theories and rationales which best further the purposes and mandates of our state statute' "). A plaintiff may sue a supervisor individually under

the WLAD, but not under the ADEA. *See, e.g., Brown* v. *Scott Paper Worldwide Co.*, 143 Wn.2d 349, 358, 20 P.3d 921, 926 (Wash. 2001) (under WLAD, "a supervisor acting in the interest of an employer who employs eight or more people can be held individually liable for his or her discriminatory acts").

We do not know whether the Court of Appeals was unaware of these significant differences between the ADEA and WLAD or assumed, *sub silentio*, that they were not inconsistent with the "substantively mirrors" test. In either event, the differences demonstrate that the decision below must be reversed. If a state statute can be deemed to substantively mirror a federal statute despite greater potential penalties and the absence of key administrative safeguards, then the test is not really one of parallelism. Rather it is reduced to inconsistent legislation—a classic preemption situation.[6]

These and other differences between the ADEA and its state-law counterparts demonstrate that the Court of Appeals' "substantively mirrors" standard allows for a distorted reflection that will impair the uniformity of the federal national bank regulatory scheme.

C. The Court of Appeals' Decision Undermines the Integrity of the National Banking System.

Courts and commentators have long recognized that, given the importance of a national bank officer's role as a representative of the bank with access to a customer's funds and property, ensuring that national banks possess the power to dismiss officers at pleasure is important to maintaining the integrity of and public trust in the bank. *See, e.g., Westervelt* v. *Mohrenstecher*,

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[6] These differences from the ADEA are not limited to the WLAD, but also exist with respect to other state employment discrimination statutes. For instance, the ADEA and its state counterparts contain different statutes of limitations. Although an ADEA plaintiff generally has 180 days from an unlawful employment practice to file charges with the EEOC, 29 U.S.C. § 626(d), a plaintiff under the California Fair Employment and Housing Act has one year from the unlawful conduct to file charges with the Fair Employment and Housing Commission. CAL. GOV. CODE § 12960(d). *See also* OR. REV. STAT. § 659A.820 ("[A] complaint . . . must be filed no later than one year after the alleged unlawful practice" to bring state agency charge).

76 F. 118, 122 (8th Cir. 1896) ("[I]t is essential to the safety and prosperity of banking institutions that the active officers, to whose integrity and discretion the moneys and property of the bank and its customers are intrusted, should be subject to immediate removal whenever the suspicion of faithlessness or negligence attaches to them."); *Aalgaard* v. *Merchants Nat'l. Bank, Inc.*, 224 Cal. App. 3d 674, 692, 274 Cal. Rptr. 81, 92 (Cal. Ct. App. 1990) (purpose of " 'at pleasure' provision of section 24 (Fifth) was to confer . . . sweeping powers of dismissal in order to ensure the fiscal integrity of national banks and to instill public confidence in those financial institutions.").

Subjecting national banks to multiple regimes of state employment regulation, as the Court of Appeals' decision does, will create uncertainty as to whether negligent or even dishonest officers may be lawfully terminated, and will discourage the dismissal of officers for legitimate cost reasons. Accordingly, the Court of Appeals' decision contravenes Congress' goal of preserving public trust in the national banking system.

IV. THE COURT OF APPEALS' DECISION CREATES A SPLIT BETWEEN THE NINTH CIRCUIT AND OTHER CIRCUITS REGARDING SECTION 24 (FIFTH)'S PREEMPTIVE EFFECT.

The Court of Appeals' decision is at odds with other Circuits' precedents interpreting provisions identical to Section 24 (Fifth) in other federal banking statutes. *See Arrow* v. *Fed. Reserve Bank of Chicago*, 358 F.3d 392, 393 (6th Cir. 2004) ("at pleasure" provision of Federal Reserve Act preempted state law claims); *Ana Leon T.* v. *Fed. Reserve Bank of Chicago*, 823 F.2d 928, 931 (6th Cir. 1987) (same); *see also Andrews* v. *Fed. Home Loan Bank of Atlanta*, 998 F.2d 214, 220 (4th Cir. 1993) ("at pleasure" provision of Home Loan Bank Act preempted state wrongful termination law); Cert. Pet. at 12-15. The Court of Appeals noted that courts have interpreted these statutes and the Act consistently with each other; their language is "virtually identical." 432 F.3d at 983, n.2. *See Fasano*, slip op. at 18 n.8.

Moreover, the Second Circuit has strongly suggested that it shares the Fourth and Sixth Circuits' view. *See Wachovia Bank,*

N.A. v. *Burke*, 414 F.3d 305, 314 (2d Cir. 2005) (*petition for cert. filed*) (Section 24 preempted state regulation of national banks' operating subsidiaries because "[t]he presumption against federal preemption disappears . . . in fields of regulation that have been substantially occupied by federal authority for an extended period of time," and "[r]egulation of federally chartered banks is one such area") (citation omitted).

The Third Circuit most recently noted that Section 341 (Fifth) of the Federal Reserve Act was analogous to Section 24 (Fifth) of the Act, *Fasano*, slip op. at 18 n.8, and held preempted state employment laws that granted greater substantive, procedural or remedial protections than permitted by federal law. *Id.* at 17, 32. The Court noted that it need not take a position on whether state remedies exactly consonant with the ADEA would be preempted. *Id.* at 28. That case, however, was certified by the District Court, and the Third Circuit granted permission to appeal, because of "a wide split in authority among courts around the country" in dealing with preemption of state employment law claims. *Id.* at 8-9. National banks are confronted with employment claims frequently, and should not be subject to non-uniform laws and rules depending on which Court of Appeals has jurisdiction over a particular branch. This Court should resolve this split in authority.

CONCLUSION

For the reasons stated herein and in U.S. Bank's Petition for a Writ of Certiorari, this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

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Respectfully submitted,

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